

FEDERAL COURT OF CANADA – TRIAL DIVISION

IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, C.17 (2ND SUPP.)

IN THE MATTER OF ARTICLES 1.6 AND 34 OF THE *COMMERCIAL ARBITRATION CODE* SET OUT IN THE SCHEDULE TO THE *COMMERCIAL ARBITRATION ACT*

AND IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT (“NAFTA”) BETWEEN S.D. MYERS, INC. AND THE GOVERNMENT OF CANADA

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

AND:

S.D. MYERS, INC.

Respondent

AND:

THE UNITED MEXICAN STATES (“MEXICO”)

Intervenor

**MEMORANDUM OF FACT AND LAW
OF THE INTERVENOR
THE UNITED MEXICAN STATES**

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PART I: STATEMENT OF FACTS

1. A statement of facts is set out in the Applicant's Amended Memorandum of Argument and will not be repeated here. The United Mexican States ("Mexico") will not refer to the underlying record of the proceeding, other than to its own submissions to the Tribunal made pursuant to Article 1128 of the NAFTA. Any reference to the facts of the dispute will be confined to the Tribunal's findings.

PART II: STATEMENT OF THE POINTS IN ISSUE

2. The Applicant seeks to have the Award set aside under paragraphs (2)(a)(iii) and (2)(b)(ii) of Article 34 of the *Commercial Arbitration Code* (the “Code”), implemented into law in Canada in section 5 of, and the Schedule to, the *Commercial Arbitration Act*, R.S., 1985, c.17 (2nd Supp.) (the “Act”).

3. Mexico intervenes solely with respect to the grounds for setting aside the Award of the Tribunal under paragraph (2)(a)(iii) of Article 34 of the *Code*. It takes no position on the Basel Convention and the Award’s consistency with the public policy of Canada.

4. Mexico respectfully submits that the Award contains decisions on disputes not contemplated by or falling within the scope of submission to arbitration and should be set aside. Specifically, Mexico will make submissions on the following:

- i) whether the Tribunal exceeded the scope of the submission to arbitration by determining that SDMI was an “investor” of another NAFTA Party;
- ii) whether the Tribunal exceeded the scope of submission to arbitration by applying Chapter Eleven obligations to cross-border trade in services;
- iii) whether the Tribunal exceeded the scope of the submission to arbitration by applying Chapter Eleven’s National Treatment obligation to the claimant S.D. Myers, Inc. (“SDMI”); and
- iv) whether the Tribunal exceeded the scope of the submission to arbitration first, by holding that Article 1105(1) contains an obligation owed to an investor, and second, by basing a breach of NAFTA Article 1105 on a breach of Article 1102.

5. These points comport with errors (a) to (c) listed by the Attorney General’s Amended Memorandum of Argument at paragraph 63.

PART III: STATEMENT OF SUBMISSIONS

A. Overview of Judicial Review under NAFTA and the Governing Domestic Legislation

1. The NAFTA Arbitral Process

6. Under Section B of Chapter Eleven, non-parties to the NAFTA (“investors”) are given direct but limited access to arbitration against the sovereign States who are the NAFTA Parties.

7. A qualifying “investor of a Party” may in specified circumstances commence an arbitral proceeding against another NAFTA Party (but not its own) for damages arising from an alleged breach of the obligations set out in Section A. The provisions governing the scope and nature of the NAFTA Parties’ consent to arbitration are set out in Section B of Chapter Eleven.

8. Investor-State arbitration was devised by the 1965 ICSID Convention, which provided for consensual arbitral proceedings against a State party to the Convention in respect of “any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State), and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre”. While neither Canada nor Mexico is a signatory to the ICSID Convention, its annulment process can provide guidance to a court that is engaged in judicial review.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”), done at Washington, D.C., March 18, 1965; entry into force October 14, 1966; published in 575 U.N.T.S. 159. Article 25 defines the Centre’s jurisdiction (Mexico’s Book of Authorities, Appendix B, Tab 1).

9. NAFTA incorporated the ICSID investor-State arbitral mechanism into Chapter Eleven but modified it in material respects. For example,

- a) the governing law of a Chapter Eleven arbitration is the “Agreement and applicable rules of international law”, rather than the domestic law of the host State and such rules of international law as may be applicable (Article 42 of the ICSID Convention);
- b) under Article 1131(2) the NAFTA Parties reserved the right to have the Free Trade Commission issue binding interpretations that form part of the governing law. (There is no equivalent provision in the ICSID Convention.); and

- c) under Article 1128, each NAFTA Party has a right to intervene in claims made against another Party in order to make submissions on matters of interpretation. (The ICSID Convention does not contemplate other States intervening in an investor's claim against a State.)

NAFTA, Articles 1128, 1131, ICSID Convention, Article 42 (Mexico's Book of Authorities, Appendix B, Tab 1)

10. Mexico made submissions on the interpretation of the NAFTA in the proceedings below.

(Canada's Book of Authorities, Appendix B, Volume II at Tab 49)

2. The Substantive Obligations Agreed to be Subject to Investor-State Arbitration

11. Generally, international law provides that only sovereign States have the legal personality and right to enforce the international treaty obligations that exist *inter se*. However, States can by treaty grant rights of access to tribunals (both arbitral and judicial) to natural or legal persons who are then given the right to enforce obligations otherwise enforceable only by States. This was done in Chapter Eleven.

12. Chapter Eleven is divided into three parts. Section A, entitled "Investment" (which contains Articles 1101-1114) sets out the scope and coverage of the chapter and the substantive obligations including national treatment, most-favored-nation treatment, the minimum standard of treatment in international law, and a prohibition against expropriation without compensation.

13. Section B, entitled "Settlement of Disputes between a Party and an Investor of Another Party" (which contains Articles 1115-1138) sets out the basis upon which the Parties agree to submit to investor-State arbitration for alleged breaches of the obligations contained in Section A. *Section B's procedural requirements are neither lengthy nor demanding of claimants.* A claimant must simply demonstrate that it is an investor of a Party making a claim in respect of its investment, that it consents to the arbitration in accordance with the NAFTA's procedures, and that it has waived its right to any proceedings for damages in respect to the measure of the disputing Party that it alleges is a breach of Chapter Eleven, Section A.

14. Section C sets out the definitions that are to be applied for the purposes of the Chapter.

15. Each NAFTA Party agreed to submit to the jurisdiction of a Chapter Eleven tribunal as follows: persons with the requisite standing are granted limited access to challenge alleged breaches of NAFTA Articles 1101 to 1114 by arbitration under Section B. Articles 1116 and 1117 state that a tribunal may consider a claim by a qualifying investor that a Party has "breached an obligation under Section A" of Chapter Eleven. A tribunal's jurisdiction is thus limited to the obligations set out in Section A (and two subparagraphs of Chapter Fifteen).

United Mexican States v. Metalclad Corporation, (2001), 89 B.C.L.R. (3d) 359; [2001] B.C.J. 950 per Tysoe J. at ¶ 58 (Canada's Book of Authorities, Appendix B, Volume I, Tab 26)

16. A tribunal has no authority to expand its terms of reference beyond Section A. Of the nearly 300 articles of the NAFTA set out in 22 chapters, a Chapter Eleven tribunal has jurisdiction to determine a breach of the 14 articles set out in Section A and the two subparagraphs of Chapter Fifteen only. This latter express reference to NAFTA articles located outside of Chapter Eleven demonstrates that the drafters knew how to vest Chapter Eleven tribunals with jurisdiction over obligations found outside of Section A. Only a NAFTA Party has the necessary standing to allege breaches of the remainder of the NAFTA. Such a dispute would take place in a Chapter Twenty State-to-State proceeding. *This distinction between what is actionable at the instance of an investor and what is actionable at the instance of a State Party is of fundamental importance to the proper operation of the NAFTA.*

United Mexican States v. Metalclad Corporation, per Tysoe J. at ¶ 58 (Canada's Book of Authorities, Appendix B, Volume I, Tab 26)

Pfizer Inc. v. Canada, [1999] 4 F.C. 441 (T.D.), per Lemieux J. at ¶¶ 55-57 (appeal dismissed October 14, 1999, Docket A-469-99 (F.C.A.)) (Mexico's Book of Authorities, Appendix B, Tab 2)

17. Thus, a particular part of the NAFTA forms the normative framework within which a tribunal may exercise its jurisdictional authority.

Marvin Roy Feldman v. United Mexican States, Interim Decision on Jurisdiction, supra, at ¶ 61 (Mexico's Book of Authorities, Appendix B, Tab 3)

3. Judicial Review Under the NAFTA

18. Chapter Eleven arbitrations are conducted before *ad hoc* arbitral tribunals.

19. By virtue of Articles 1130 and 1136, the NAFTA Parties have expressly vested their courts with the jurisdiction to review these arbitral awards. Unless the disputing parties otherwise agree, only the courts of the three NAFTA Parties can be considered when the place of arbitration is designated. If review is sought, the award is not enforceable until after the designated court has resolved any application to set the award aside and there is no further appeal. The courts thus act as a treaty-based safeguard against tribunals that fail to act within the scope of the submission to arbitration, commit arbitral error, or make awards that are contrary to public policy. Many of the legal questions concerning the reviewing court's role vis-à-vis a NAFTA tribunal are novel and open questions.

Waste Management v. United Mexican States ("Waste Management II"),
Decision on Venue, 25 September 2001 (Mexico's Book of Authorities,
Appendix B, Tab 4)

20. Judicial review under the NAFTA entails review of an investor-State arbitration arising out of an international treaty as opposed to private international commercial arbitrations arising out of commercial agreements, made between private parties or between private parties and governments (*e.g.*, concession contracts).

21. The differences between mixed investor-State arbitration and ordinary private international commercial arbitration must be considered for their impact on the standard of review to be applied by the courts. These types of applications pose novel questions, and existing analogous authorities must be considered in light of those new questions.

22. The Court can derive some assistance from the practice of ICSID annulment committees. Such committees are charged with reviewing investor-State awards made under the ICSID Convention. As the Respondent recognizes at paragraph 62 of its Memorandum of Argument, the ICSID Arbitration Rules are well developed. Some annulment committees have completely annulled arbitral awards; another has partially annulled an award.

Klöckner v. Cameroon, Decision on Annulment, 3 May 1985, 2 ICSID Reports 95 (Mexico's Book of Authorities, Appendix B, Tab 5); *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 508 (Mexico's Book of Authorities, Appendix B, Tab 6); *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 79 (Canada's Book of Authorities, Appendix B, Volume I, Tab 24)

23. The novelty of judicial review of NAFTA arbitrations should not obscure a fundamental point common to all arbitration: arbitral tribunals have no inherent jurisdiction. The jurisdiction of any consensual tribunal is limited by the parties' agreement. The agreement defines the scope of the submission to arbitration. A tribunal's disregard of the limits of this agreement will result in a decision that is outside the scope of the submission to arbitration.

24. Another Chapter Eleven tribunal has held that:

The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is founded. This assertion serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.
[Emphasis added]

Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/98/2, Arbitral Award, June 2, 2000, ¶16 (Canada's Book of Authorities, Appendix B, Volume I, Tab 17)

B. Scope of the Submission to Arbitration

25. Article 34(2)(a)(iii) of the *Code* provides that the Court may set aside the Award where it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Commercial Arbitration Code, supra, art. 34(2)(a)(iii)

26. NAFTA Article 102(2) requires the Agreement to be applied "in accordance with applicable rules of international law". It is widely accepted that the *Vienna Convention on the Law of Treaties* sets out the applicable rules. In applying the Agreement, it is appropriate for a Tribunal to look at the context of the NAFTA and to have regard to its objectives. It is also necessary for a tribunal to interpret the obligations with which it is seized. *However, it is not permissible, under the rubric of contextual interpretation, for a tribunal of limited jurisdiction to legislate new rights or to import into the obligations over which it has jurisdiction, treaty obligations and concepts that are not contained therein.*

27. To the extent that a tribunal expands its terms of reference beyond Section A, it will decide matters beyond the scope of the submission to arbitration. Such an action is outside the scope of the submission to arbitration and constitutes a ground on which the award may be set aside.

28. This is the second court application to review a NAFTA arbitration award. On 2 May 2001, the Supreme Court of British Columbia issued its Reasons for Judgment in the case of *United Mexican States v. Metalclad Corporation*. In that case, Tysoe J. set aside the award of a NAFTA tribunal in part after holding that it had acted outside the scope of the submission to arbitration. The Court set aside the Tribunal's determination of a breach of Article 1105 and two determinations of breach of Article 1110; it allowed a third determination of breach of Article 1110 to stand.

United Mexican States v. Metalclad Corporation, supra, at ¶¶ 76, 79, and 137 (Canada's Book of Authorities, Appendix B, Volume I, Tab 26)

29. It shall be submitted that the Tribunal acted outside the scope of the submission to arbitration in four ways. First, it failed to apply the governing law when it came to determining whether it had jurisdiction *ratione personae*. The proper application of the treaty dictated a finding that SDMI was not an investor in Myers Canada and therefore had no standing. The Tribunal then committed further jurisdictional error by confusing a cross-border trade in services

claim not cognizable under Chapter Eleven with an investment claim. Finally, it misstated and misapplied the governing law under both Articles 1102 and 1105.

C. Standard of Review

30. The Supreme Court of Canada has adopted a “pragmatic and functional” approach to determine the proper standard of review applicable to decisions of bodies which otherwise had jurisdiction to proceed to an inquiry. The constating documents are examined to determine whether it was intended that the body should make the final decision, and what the nature of the Court’s reviewing role should be.

U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 11)

Canada (Director of Investigations and Research) v. Southam Inc., [1997] 1 S.C.R. 748 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 12)

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 22)

31. In *Metalclad*, Tysoe J. held that it would be in error to import the “pragmatic and functional approach” into review under the B.C. *International Commercial Arbitration Act* (“ICAA”). At the same time, he recognized that some of the principles discussed by the Supreme Court of Canada in this line of authorities will be of assistance in applying ss. 5 and 34 of British Columbia’s legislation which is equivalent to the *Code*.

United Mexican States v. Metalclad Corporation, *supra*, at ¶ 54 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 26)

32. In Mexico’s respectful submission, it is appropriate to apply such principles to the judicial review of an arbitration that does not resemble ordinary international commercial arbitration in terms of:

- the way in which the Tribunal is constituted,
- the arbitration’s subject matter,
- the governing law, and
- the public interests arising from the dispute and the dispute settlement mechanism itself.

33. The different factors that must be considered and that have a bearing on the standard of review to be applied by the courts are discussed below.

1. The Nature of the Arbitration Under Review Affects the Standard of Review

34. In *The Law and Practice of Commercial Arbitration in England*, Sir Michael J. Mustill and Stewart C. Boyd, 2nd ed. (Butterworths: London, 1989), at p. 54, warn against reliance in applying generalized authorities to different types of arbitrations, stating:

...when considering a reported case it is necessary always to bear in mind the type of arbitration with which it was concerned. Decisions and statements of principle which were perfectly valid at the time, and remain good law today, may nevertheless yield completely false results if applied in a different context. A commodity arbitration on quality and a formal reference pursuant to statutory powers are both examples of arbitration, but they are barely recognizable as the same process, and attempts to transfer principles from one to the other will inevitably lead to error.

(Mexico's Book of Authorities, Appendix B, Tab 7)

35. Mexico takes no issue with the general approach taken in Canadian law to review of arbitrations between private parties under an arbitration clause in an international commercial agreement. However, there are aspects of that approach and the policy considerations that underlie it, which should not govern applications to review awards resulting from a mixed arbitration between an investor and a sovereign State regarding alleged breaches of an international treaty.

2. Determining the Applicable Standard of Review Under Article 34(2)(a)(iii)

36. At paragraph 84 of its Memorandum of Argument, the Respondent observes that *Quintette* did not refer to the "pragmatic and functional approach", nor did it refer to the "shopping list" of considerations formulated in the *Southam* and *Pushpanathan* cases. *Quintette* was decided before those cases.

37. Under the "pragmatic and functional" analysis, the applicable standard of review is located on a spectrum, ranging from "correctness" at one end – where the Tribunal must resolve the question before it correctly in order to stay within its jurisdiction – and "patent unreasonableness" at the other end – where the tribunal's decision will be upheld unless it is patently unreasonable. In the centre of the spectrum lies the standard of "*reasonableness simpliciter*". The standard of *reasonableness simpliciter* is closely akin to the "clearly wrong" test utilized by appellate courts in reviewing findings of fact by trial judges.

Baker v. Canada (Minister of Citizenship and Immigration), at 1005
(Canada's Book of Authorities, Appendix B, Volume I, Tab 8)

Canada (Director of Investigation and Research) v. Southam Inc., supra,
at 776-7, 779 (Canada's Book of Authorities, Appendix B, Volume I,
Tab 12)

38. Mexico agrees with the Attorney General of Canada (at paragraph 122 of the Amended Memorandum of Argument) that the following factors are to be taken into account when applying the pragmatic and functional approach to determining the standards of review:

- a) the presence or absence of a privative clause (including the type of clause);
- b) the relative expertise of the tribunal, as compared to the Court;
- c) the nature of the decision being made, *i.e.*, whether it is a question of law or a question of fact;
- d) whether the decision to be made is "polycentric", *i.e.*, necessarily involves a consideration of often-conflicting and multi-faceted issues; and
- e) the purpose of the provision and the constating documents more generally.

39. Applying these factors, a decision of a tribunal that is subject to a "full" privative clause (one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all form of judicial review are excluded) or of a tribunal with a high degree of expertise to the issues considered shall be examined with great deference in judicial review proceedings.

a. There is no full privative clause in the NAFTA

40. In considering privative clauses in the case of a consensual arbitration tribunal, it is necessary to examine:

- a) the arbitration agreement and applicable arbitral rules; and
- b) the legislation governing the arbitration.

41. The arbitration agreement created by Section B of the NAFTA replaces the constating legislation of an administrative tribunal in determining the scope of the powers conferred on the tribunal and informs the nature of the problem. The applicable arbitral rules may bear on expertise and the governing law may contain privative clauses and other relevant factors. In this case, the arbitration agreement is formed by an investor's acceptance of the standing offer to arbitrate contained in Chapter Eleven of the NAFTA. This is done by filing a notice of claim that also stipulates the applicable arbitral rules.

42. Chapter Eleven does not contain a "full" privative clause. Instead, it expressly contemplates judicial review (in the case of UNCITRAL and ICSID Additional Facility arbitrations) in the courts of the place of arbitration, or *ad hoc* committee revision or annulment

(in the case of ICSID arbitrations), with an automatic stay of enforcement pending review and further appeal.

b. There is no “powerful presumption of jurisdiction” in cases involving sovereign states

43. The British Columbia Court of Appeal held in *Quintette Coal Ltd. v. Nippon Steel Corp.* that where a private international commercial tribunal’s jurisdiction is called into question, an applicant must overcome “a powerful presumption” that the tribunal acted within its powers.

Quintette Coal Ltd. v. Nippon Steel Corp., (1990), 50 B.C.L.R. (2d) 207 at 223 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 2)

44. *Quintette* did not review an arbitration involving a sovereign State. The powerful presumption of jurisdiction referred to therein does not apply in an investor-State claim against a sovereign State. In *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, in its award on jurisdiction, an ICSID Tribunal stated:

Clearly, then, there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine Egypt’s objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties. [Emphasis added]

Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, Award on Jurisdiction, dated April 14, 1988, 3 ICSID Reports 131 at 143 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 27)

45. Given the NAFTA Parties’ limited consent to arbitration in Chapter Eleven, the need to carefully confirm jurisdiction has been accepted by NAFTA tribunals.

Waste Management, Inc. v. United Mexican States, *supra*, at ¶16 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 17)

46. It was also accepted by the Supreme Court of British Columbia in *Metalclad* which applied a correctness standard in its review of jurisdictional matters.

United Mexican States v. Metalclad Corporation, *supra*, at ¶¶ 70-74, (Canada’s Book of Authorities, Appendix B, Volume I, Tab 26)

c. While Tribunal members must possess the qualifications prescribed by the arbitral rules, there is no requirement that they be expert in the NAFTA or even in international law

47. Expertise has been described as the most important of the factors the court must consider. This is a relative concept closely related to the nature of the problem. A decision which involves the application of a highly specialized technical expertise will militate in favour of a high degree of deference.

48. With respect to the Respondent's submission at paragraph 91 (which asserts that Article 1124 demonstrates that it is expected that Chapter Eleven tribunals are to be composed of experts "experienced in international law and investment matters"), no roster of presiding arbitrators has been agreed by the NAFTA Parties and thus no member of this Tribunal was selected from any such roster.

49. Indeed, there is no requirement that the arbitrators be expert in the NAFTA, in international trade and investment law, or even in international law generally. Article 9 of the UNCITRAL Arbitration Rules requires only that the arbitrators be impartial and independent. The NAFTA does not stipulate any additional qualifications (other than in Article 1124, which, as noted above, has not been acted upon by the Parties).

50. In addition, unlike WTO dispute panels, *ad hoc* NAFTA tribunals have no professional secretariat to assist them in marshalling the evidence for the award, analyzing the legal issues, or assisting in drafting the award. The WTO Secretariat provides important legal and policy support both for panels and the Appellate Body. There is no Chapter Eleven equivalent.

51. The questions raised before a Chapter Eleven Tribunal involve questions of fact, questions of mixed law and fact and questions of international law. They can involve the interpretation of a new treaty and the applicable rules of international law.

52. Canadian superior courts are experienced in addressing questions of international law in the course of applying various types of statutes. The Supreme Court of Canada has commented on Canadian courts' facility in this regard on numerous occasions. In *Reference re Secession of Quebec*, for example, the Supreme Court of Canada considered whether Quebec had a right at international law to secede from Canada unilaterally. The *amicus curiae* appearing before the Court argued that this question was "beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law". The Court rejected that submission:

This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system. For example, in *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with respect to diplomatic immunity, a municipal

council had the power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (*Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86).

Reference re Succession of Quebec, [1998] 2 S.C.R. 217 at paras. 21-22 (Mexico's Book of Authorities, Appendix B, Tab 23)

d. The nature of the dispute

53. In the proceeding under review, the private party has challenged acts of a sovereign State as violations of international law. The dispute involves substantial public interests and but for Canada's offer to submit to the jurisdiction of a Section B tribunal, the claimant would have had no standing to enforce international legal obligations owed by Canada to the other NAFTA Parties.

54. Chapter Eleven tribunals increasingly recognize that they differ from ordinary private international commercial arbitration tribunals. In a procedural decision in *Methanex Corporation v. United States of America*, the Tribunal held:

49. There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions... [Emphasis added]

Decision of the Tribunal on Petitions from Third Parties to Intervene as "*Amicus Curiae*" 15 January 2001 (Canada's Book of Authorities, Appendix B, Volume I, Tab 16)

55. More recently, the Tribunal in *UPS v. Canada* held in respect of an application to permit the filing of *amicus* interventions:

70. The Tribunal returns to the emphasis which the Petitioners, with considerable cogency, have placed both on the important public character of the matters in issue in this arbitration and on their own real interest in these matters. It recalls as well the emphasis placed on the value of greater transparency for proceedings such as these. Such proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties... [Emphasis added]

Decision of the Tribunal on Petitions for Intervention and Participation
as *Amicus Curiae*, 17 October 2001 (Mexico's Book of Authorities,
Appendix B, Volume I, Tab 8)

**e. Decisions of NAFTA tribunals can have profound
implications for public policy and government authority
in each of the Parties**

56. Another important point in determining the standard of review is whether the result is of any interest beyond the immediate parties to the arbitration. With respect to ordinary international commercial arbitration, as simply the resolution of private disputes, where, often, even the existence of the dispute is not public and awards are not published, such disputes do not create a body of law which could affect others. This is one reason why commercial arbitrators generally are permitted to be wrong if they have otherwise complied with the governing rules and the submission to arbitration.

57. This rationale is not applicable in the context of the interpretation of an international treaty such as the NAFTA where incorrect or unreasonable decisions will have significant public policy ramifications in all of the jurisdictions of the Parties. Incorrect or unreasonable decisions can lead to an increase in claims against all three NAFTA Parties.

58. Thus, a Chapter Eleven arbitration is unlike the case of an *ad hoc* private commercial arbitration where the result is not apt to be of much interest to others in the future. The work of NAFTA tribunals, and the work of the reviewing courts of the three Parties, is of intense and general interest to the Parties, their citizens and their investors given the generality of the application of the questions involved.

3. The Applicable Standard of Review

59. In the light of the above and since the only legal basis for an arbitration award under NAFTA Chapter Eleven is the consent of the NAFTA Parties limited to the articles contained in Section A of Chapter Eleven, Mexico respectfully submits that the standard that this Court must use to determine whether the Tribunal acted within the scope of the submission to arbitration within the meaning of Article 34(2)(a)(iii) of the Code is correctness.

60. In *Metalclad*, Tysoe J. applied a standard of correctness in order to determine whether the arbitral award contained decisions beyond the scope of the submission to arbitration.

United Mexican States v. Metalclad Corporation, supra, at ¶¶ 56-76
(Canada's Book of Authorities, Appendix B, Volume I, Tab 26)

4. Applying the Correctness Standard

61. Where the standard of review is correctness, the Tribunal is not entitled to any deference. It must be correct, or its decision will be set aside. The Court is entitled to substitute its own views for those of the original decision-maker.

Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342 at p. 355
(Canada's Book of Authorities, Appendix B, Volume I, Tab 10)

62. Where the question at issue concerns a constating provision that limits the tribunal's powers, the standard of review is that of correctness. The point was made by the Supreme Court of Canada in *U.E.S., Local 298 v. Bibeault*, *supra*, at p.1086:

It is, I think, possible to summarize in two propositions the circumstances in which an administrative Tribunal will exceed its jurisdiction because of error:

1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a Tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the Tribunal to judicial review.

(Canada's Book of Authorities, Appendix B, Volume I, Tab 11)

5. Potential Relevance of the *Reasonableness Simpliciter* and Patently Unreasonable Standards

63. Since Mexico considers that the Tribunal committed jurisdictional error in four instances, strictly speaking, it is unnecessary to discuss other possibly applicable standards of review. However, to the extent that such issues may arise, Mexico's views are as follows.

64. In Mexico's respectful submission, in *Quintette*, *supra*, Gibbs J.A. left open the question of review on the basis of the domestic standard for patently unreasonable error. He said at p. 230:

Even applying the domestic test (*Shalansky v. Regina Pasqua Hosp. Bd. of Gov.* (1983), ... 145 D.L.R. (3d) 413 ... (S.C.C.)), their interpretation is one which the words of the contract can reasonably bear. The conditions precedent to intervention by the court spelled out in s. 34(2)(a)(iv) of the Act have not been met. The language of the statute forecloses the court from intervention.

(Canada's Book of Authorities, Appendix B, Volume I, Tab 2)

65. The case referred to, *Shalansky*, involved judicial review of a decision of a consensual arbitration board interpreting a collective agreement and noted at p. 416 (D.L.R.):

The decision of the arbitrator can be set aside only if it involves an interpretation which the words of the agreement could not reasonably bear.

(*Shalansky v. Regina Pasqua Hosp. Bd. of Gov.*, (1983) 145 D.L.R. (3d) 413 (S.C.C.) (Mexico's Book of Authorities, Appendix B, Tab 9)

66. It must be pointed out to this Court that in *Metalclad*, Tysoe J. did not agree with Mexico that Gibbs J.A. left open the question of whether review under s. 34 of the *ICAA* could be made on the domestic standard for patently unreasonable error. However, Tysoe J. did subsequently apply the patently unreasonable test to certain determinations made by the NAFTA tribunal under review.

United Mexican States v. Metalclad Corporation, per Tysoe J. at ¶ 96-104, (Canada's Book of Authorities, Appendix B, Volume I, Tab 26)

67. It is respectfully submitted that Tysoe J. erred in stating at paragraph 54 of his Reasons for Judgment that the:

... standard of review is set out in ss. 5 and 34 of that Act [the *ICAA*] and that it would be an error for me to import into that Act an approach which has been developed as a branch of statutory interpretation in respect of domestic tribunals created by statute. [Emphasis added]

United Mexican States v. Metalclad Corporation, per Tysoe J. at ¶ 54, (Canada's Book of Authorities, Appendix B, Volume I, Tab 26)

68. In Mexico's respectful view, ss. 5 and 34 of the *ICAA* and arts. 5 and 34 of the *Code* set out the *grounds* for review but not the *standard of review* to be applied to them and Tysoe J. erred on this point. Neither the *ICCA* nor the Federal *Code* expressly states a standard of review.

69. Mexico respectfully submits that, having regard to the factors that differentiate NAFTA arbitration from ordinary international commercial arbitration, with respect to the review of matters other than those relating to the jurisdiction of the Tribunal, which are subject to a correctness standard, the *reasonableness simpliciter* standard should be employed by this Court.

70. In the alternative, the patently unreasonable standard should be employed under Article 34(2)(a)(iii). In Mexico's view, a patently unreasonable error can lead to a Tribunal acting outside the scope of the submission to arbitration.

71. At paragraph 150 of the Amended Memorandum of Argument, the Attorney General cites *Navigation Sonamar Inc. v. Algoma Steamships Ltd.*, where Gonthier J., sitting as a Justice of the Quebec Superior Court, engaged in the first consideration of the UNCITRAL Model Law. Gonthier J. referred to the basic principle of Canadian justice that it can be "jurisdictional" error to reach a result by a process of reasoning that is patently unreasonable.

Navigation Sonomar Inc. v. Algoma Steamships Ltd., [1987] R.J.Q. 1346; (1995), 1 M.A.L.Q.R. 1 (Que. S.C.) (Canada's Book of Authorities, Appendix B, Volume I, at Tab 25)

72. Mexico respectfully agrees with the passage from Gonthier J.'s reasons quoted at paragraph 150 of the Attorney General's Amended Memorandum. Specifically, Mexico agrees that the patently unreasonable standard can be seen as one variety of excess of jurisdiction, or can be seen as an independent ground for setting aside an award that conflicts with public policy. Gonthier J. refers to both bases in *Navigation Sonomar Inc.*

73. A patently unreasonable error requires review by the courts, as it constitutes an excess of the tribunal's jurisdiction.

Pointe-Claire (City) v. (Quebec) Labour Court, per L'Heureux-Dube J., at paragraph 68, dissenting in the result but not on this point. [1997] 1 S.C.R. 1015 (Canada's Book of Authorities, Appendix B, Volume I, Tab 3)

74. To determine whether a decision is patently unreasonable it must be asked whether the decision was based on the evidence adduced and whether the interpretation was patently unreasonable. This can involve an examination of the reasons for the decision and the result of the decision: see *Pointe-Claire*, at paragraph 30, paragraphs 58-59.

75. In *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, as noted by Gonthier J. in *Navigation Sonomar Inc. v. Algoma Steamships Ltd.*, Dickson J. (as he then was), framed it this way:

Did the board . . . so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation, *supra*, at 237 (Canada's Book of Authorities, Appendix B, Volume I, Tab 18)

76. When determining whether a tribunal's decision is patently unreasonable, it is often necessary to examine closely the factual and legislative record. As Gonthier J. held in *National Corn Growers Assn. v. Canada (Import Tribunal)*:

In some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis. Such was the case in the *C.U.P.E.* decision where it was found that the Board's interpretation of the legislation at issue was reasonable even though it was not the only reasonable one. Similarly, understanding of

the issues raised by the appellants herein as to the reasonableness of the Tribunal's decision requires some analysis of the relevant legislation and the way in which the Tribunal has interpreted and applied it to the facts.

National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 at 1370 (Canada's Book of Authorities, Appendix B, Volume I, Tab 15)

77. Mexico respectfully submits that each of the following grounds for setting aside the Award are established by the Tribunal's having acted outside the scope of the submission to arbitration. It also submits that each is patently unreasonable as well. If they are patently unreasonable, it would follow that they do not meet the less strict *reasonableness simpliciter* test.

D. Submissions

1. The Tribunal's determination that SDMI was an "investor" of a Party fell outside the scope of the submission to arbitration

78. Mexico concurs with the Attorney General's submission that the Tribunal committed jurisdictional error when it held that SDMI was an "investor of a Party" and therefore was entitled to bring a Chapter Eleven claim. Mexico's analysis of the issue overlaps with Canada's but also differs in some respects.

a. A tribunal has no inherent jurisdiction

79. An international arbitral tribunal does not possess the inherent jurisdiction of a superior court. Nor does it possess any jurisdiction to legislate new rights and obligations that the sovereign States have not seen fit to create. It is well established in international trade law that a dispute settlement body has no jurisdiction to legislate. International treaties are negotiated by sovereign States and they do not consent to arbitrators adding to the rights and obligations that have been established in lengthy and complex negotiations. The World Trade Organization's *Dispute Settlement Understanding* is typical in expressing this concern. Article 3, entitled General Provisions, states in this regard:

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB [the Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements. [Emphasis added.]

WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (Mexico's Book of Authorities, Appendix B, Tab 10)

b. The Tribunal was obliged to ensure that it had jurisdiction *ratione personae*

80. An international tribunal must have three types of jurisdiction in order to entertain a claim: jurisdiction *ratione personae*, jurisdiction *temporis* and jurisdiction *materiae*.

81. Jurisdiction *ratione personae* is established when a person with the requisite standing commences a claim in accordance with the governing arbitral rules.

Vacuum Salt Products Limited v. Ghana, 4 ICSID Reports 329
(Mexico's Book of Authorities, Appendix B, Tab 11)

82. In the instant case, the Tribunal's finding that SDMI was an investor of another Party and thus entitled to prosecute a claim was its first error. In Mexico's respectful submission, the Tribunal was obliged to dismiss the claim due an absence of jurisdiction *ratione personae*.

83. As noted above in paragraph 13, Section B's requirements for the commencement of a Chapter Eleven claim are not onerous. However, one fundamental requirement is that the would-be claimant actually be the investor in the investment that is the subject of the claim.

84. The governing law for determining whether a person has the standing to advance a claim starts with Article 1139. The Tribunal must first ask: what is the "investment" that is the subject of the dispute? If, as here, it determines that the investment is an enterprise (Myers Canada), it must then determine who owns or controls the enterprise directly or indirectly.

85. Article 1139 defines "investment of an investor of a Party" as "an investment owned or controlled directly or indirectly by an investor of a Party". The Tribunal found that the four Myers brothers, not SDMI, owned and controlled Myers Canada (Award at paragraph 227), yet it permitted SDMI to prosecute their claim.

86. The Tribunal also found that Mr. Dana Myers controlled "the entirety of the Myers family's business interests" (Award at paragraph 230). This might have supported an alternative finding that Mr. Myers was an investor of another Party due to his control of Myers Canada and thus was entitled to commence a claim in his own name. However, once again, the Tribunal did not act on the finding that Mr. Myers was the controlling investor but rather permitted SDMI to prosecute his claim.

87. The Tribunal found instead that a U.S. company that did not own or control Myers Canada was the investor therein.

88. This finding cannot be supported on the plain language of the NAFTA.

c. The Tribunal had no jurisdiction to remedy the defect in standing

89. Although the Tribunal observed that there might be other bases for finding that SDMI was an investor of a Party, it permitted the claim to be advanced not on any of those bases but rather because:

...the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organize the way in which it conducts its business.
[Emphasis added]

Award, para. 229

90. This statement shows not only that the Tribunal posed the wrong question to itself but also that it misconceived its authority to apply the NAFTA.

91. At paragraph 167 of its Amended Memorandum of Argument, Canada describes the Tribunal's act as an exercise of an *ex aequo et bono* jurisdiction where no such jurisdiction has been conferred upon it. Mexico agrees. NAFTA's governing law (unlike the ICSID Convention, which contemplates a Tribunal being authorized to exercise such a jurisdiction) does not permit a Chapter Eleven Tribunal to apply such a jurisdiction. It is, as Canada argues, quoting the leading ICSID annulment case, a disregard of the agreed rules of law which constitutes a derogation from the terms of reference within which the Tribunal was authorized to function.

MINE v. Guinea, supra, at 87 (Canada's Books of Authorities, Appendix B, Volume 1, Tab 24)

92. Furthermore, by stating that it did "not *accept* that an otherwise meritorious claim *should fail* by reason of the corporate structure adopted by a claimant" (emphasis added), the Tribunal was remedying the defect in standing. In doing so, the Tribunal engaged in an unauthorized act of legislation.

93. The Tribunal had no power to remedy the defect in standing; if SDMI did not own or control Myers Canada, it was not an investor therein and the only action open to the Tribunal was to dismiss the claim on the basis of an absence of jurisdiction *ratione personae*. The Tribunal, acting within the scope of the limited jurisdiction conferred upon it by Section B, was obliged to let the claim fail.

94. The Myers brothers could have advanced their own claim in relation to the enterprise at issue. Mr. Dana Myers may also have been able to advance a claim based upon his control of Myers Canada. However, neither did so and the Tribunal did not proceed on either basis.

d. This was a major jurisdictional error

95. The Tribunal was profoundly in error in viewing this as a minor issue of corporate organization curable by its refusal to accept the proper conclusion in law so that an “otherwise meritorious” claim could proceed. It is fundamental to the proper operation of the NAFTA. In addition to depriving the Tribunal of jurisdiction *ratione personae* (which in itself is fatal to the claim), the error led the Tribunal into subsequent error in employing SDMI as the object of a national treatment test under Article 1102 and the separate error of considering SDMI as the “investment” for the purposes of an Article 1105 analysis.

96. As this was an issue that went to the Tribunal’s jurisdiction, *Metalclad* shows that this Court is to review the determination on the basis of correctness. In Mexico’s respectful submission, the Tribunal acted without jurisdiction *ratione personae* and the Award must be set aside in its entirety.

2. The Tribunal’s error in determining the “investor” led it to permit a “cross-border trade in services” claim to be advanced in the guise of an investment dispute

97. The improper and unauthorized acceptance of SDMI as the “investor” created a domino effect in that the Tribunal was then led into a series of erroneous analyses of Canada’s treatment of the “investor”. These errors go beyond non-reviewable error of law.

a. The Tribunal failed to understand NAFTA’s structure

98. The Tribunal’s misunderstanding of the issue stemmed from its failure to understand the NAFTA’s architecture, notwithstanding its having received submissions on the point.

Submission of the United Mexican States, dated 14 January 2000 at paragraphs 15-20 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 49)

99. As the Attorney General points out at paragraph 180, WTO jurisprudence stresses that dispute settlement panels may not ignore the fundamental structure and logic of a provision in deciding the proper sequence of steps in its analysis, save at the peril of reaching flawed results.

100. The NAFTA’s architecture reflects the fact that the three Parties were seeking to liberalize trade flows in goods and services as well as investment between their three territories.

NAFTA is based upon the notion of *territoriality* and the different means by which business is transacted *within a Party's territory and from one national territory to another*.¹

b. The Tribunal failed to understand the distinction between what is actionable under Party-to-Party dispute settlement and what is actionable under investor-State arbitration

101. The NAFTA Parties expressly distinguished between commercial activity occurring through investment and commercial activity occurring through cross-border services. Measures relating to the former can be the subject of an investor-State arbitration; measures relating to the latter cannot.

102. NAFTA's general dispute settlement mechanism is Chapter Twenty. Like the World Trade Organization's *Dispute Settlement Understanding*, it provides for State-to-State dispute settlement for matters covered by the Agreement. With the exception of Chapter Eleven, the only means for challenging a Party's actions that are alleged to have contravened the NAFTA is a Chapter Twenty State-to-State proceeding.² Thus,

¹ Article 1101 provides that Chapter Eleven applies to measures adopted or maintained by a Party relating to ... investments of investors of another Party in the territory of the Party..."

Article 1139 defines investor as a person of a party that has made, is making or seeks to make an investment. Investment is confined eight categories of legal or economic interests, including "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory...".

Article 1102 requires each Party to accord treatment no less favorable than it accords to its own investors and their investments to the investors of the other Parties and their investments.

Article 1105 requires each Party to accord treatment in accordance with international law to the investments of the investors of the other Parties.

Article 1110 prohibits a Party from expropriating an investment of investor of another Party in its territory.

Article 1116 and 1117 provide that an investor may make a claim on its own behalf, or on behalf of an investment that it owns or controls, that another Party has breached an obligation under Section A and that the investor, or is investment (as the case may be), has suffered loss or damage by reason of, or arising out of, such breach.

² There is a specialized form of dispute settlement in Chapter Nineteen for the binational panel review of anti-dumping and countervailing duty orders. However, this mechanism is not designed to determine whether a Party's order is consistent with its international obligations but rather whether it is in accordance with its national law.

- all trade in goods disputes are actionable only by the NAFTA Parties through Chapter Twenty;
- all government procurement disputes are actionable only by the NAFTA Parties through Chapter Twenty;
- all cross-border services disputes are actionable only by the NAFTA Parties through Chapter Twenty;
- all temporary business travel disputes are actionable only by the NAFTA Parties through Chapter Twenty; and
- all intellectual property disputes are actionable only by the NAFTA Parties through Chapter Twenty.

103. Where a NAFTA breach is alleged, therefore, the vast majority of NAFTA obligations are remediable only by the means afforded by Chapter Twenty. That chapter does not contemplate the award of damages. Rather, consistent with other international trade agreements, breaches of the NAFTA are, for the vast majority of obligations, not compensable in monetary damages to the complainant's benefit. The objective is the removal of the offending measure.

104. This underscores the extraordinary nature of the only chapter of NAFTA that contemplates the award of damages for a breach, namely, Chapter Eleven. An alleged breach of Chapter Eleven can be the subject of either a State-to-State proceeding—where damages would not be recoverable by the complainant State—or an investor-State claim (or both).

105. The Parties included this extraordinary remedy to offer specific treaty protections to their nationals who, encouraged by the trade liberalization of NAFTA, established investments in the territory of the other Parties. If an investor commits substantial economic resources to investment in another Party and encounters problems there, Chapter Eleven allows the investor to seek damages for an alleged breach of Section A, rather than having to convince its own government to espouse the claim as its own at international law.

106. However, the NAFTA Parties never intended to permit commercial actors of a Party with an interest in carrying on trade in goods or services with persons in another NAFTA Party to use Chapter Eleven to claim damages against a measures of that Party that may have affected their ability to do so. In such instances, the only recourse is a State-to-State proceeding under Chapter Twenty.

c. Canadian law implements the distinction between what is actionable by an investor and what is actionable by a State Party

107. NAFTA Article 2021 imposes a specific obligation upon each Party *not* to permit private causes of action in its domestic law on the ground that a measure of another Party is inconsistent with the NAFTA. There is Canadian law implementing the NAFTA on this point and Canadian

jurisprudence construing that and similar acts implementing Canada's international trade obligations.

108. This Court discussed the NAFTA implementing Act in *Pfizer Inc. v. Canada*. The *North American Free Trade Implementation Act*, S.C. 1993, c. 44, states in section 6:

6. (2) Subject to Section B of Chapter Eleven of the Agreement, no person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement. [Emphasis added]

Pfizer Inc. v. Canada, *supra*, at ¶ 53 (Mexico's Book of Authorities, Appendix B, Tab 2).

109. At Canadian law, the *only* cause of action and proceeding of any kind that can be taken by a private party in relation to the NAFTA is under Section B of Chapter Eleven. The effect of this, and a similar statutory bar in the act implementing Canada's accession to the WTO by way of the *World Trade Organization Agreement Act* (S.C. 1994, c. 47, ss. 5, 6) was commented on by this Court:

The true purpose of sections 5 and 6 of the WTO Agreement Implementation Act is evident as are similar provisions in the other implementation statutes referred to above. What Parliament is saying is that these international trade agreements are matters of public law concerning public rights, rights affecting Canada as a sovereign state. They are not matters of private economic or commercial rights giving rise to causes of action and legal proceedings. These sections do not eliminate any private rights; they do not extinguish rights; Parliament is simply saying no such rights arise.

Parliament's concern relates to the very nature of international trade agreements between sovereign states and the mechanisms for dispute settlement and the enforcement of panel or arbitration rulings.

The WTO Agreement provides for such mechanisms. Parliament did not want private parties except where it may be appropriate, to initiate private actions which would disrupt or adversely affect the agreed to equilibrium for dispute settlement. [Emphasis added]

Pfizer Inc. v. Canada, *supra*, at ¶¶ 55-57 (Mexico's Book of Authorities, Appendix B, Tab 2).

110. The Article 1116 and 1117 limitations discussed above in paragraph 15 are thus of central importance in defining the jurisdiction of Chapter Eleven tribunals. The NAFTA Parties did not consent to investor-State arbitration of the provisions of NAFTA *except* for alleged breaches of Section A of Chapter Eleven. They also committed themselves to not permit a right of action against another Party based on the ground that its measure was inconsistent with the NAFTA.

To quote this Court, for *all of NAFTA except Section A*, the NAFTA Parties do not want private parties “to initiate private actions which would disrupt or adversely affect the agreed to equilibrium for dispute settlement”.

111. This point was accepted by Tysoe J. in *Metalclad*:

Before I turn to a specific examination of Article 1105, I wish to make some general comments about the structure of arbitration under Chapter 11. Under most agreements containing arbitration provisions, it is provided that a dispute between the parties to the agreement may be resolved through arbitration. Strangers to the agreement cannot invoke the arbitration procedure because it is only the parties to the agreement who consented to resolve disputes between themselves by arbitration. This normal type of arbitration provision is found in Chapter 20 of the NAFTA.

Section B of the NAFTA establishes a separate arbitration procedure. It allows investors of a Party (who are not themselves a party to the NAFTA) to make claims against other NAFTA Parties by way of arbitration. However, the right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A of Chapter 11 and two Articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions of the NAFTA. 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 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. [Emphasis added]

United Mexican States v. Metalclad Corporation, supra at ¶¶ 57-58
(Canada’s Book of Authorities, Appendix B, Volume I, Tab 26)

112. Section B’s jurisdictional limits require tribunals to determine both the form of a commercial activity and its connection to a national territory. Chapter Eleven, like other NAFTA chapters, repeatedly refers to the territorial connection between an investor and an investment (*e.g.*, an investor “of a Party”, “investments of investors of another Party in the territory of a Party”). Given this plain treaty language, Mexico disagrees with the Respondent’s submissions to the contrary at paragraphs 151-154 of its Memorandum of Argument.

d. “Cross-border trade in services” is treated differently from investment under the NAFTA

113. Chapter Twelve, which deals with cross-border trade in services, requires that NAFTA Parties accord certain treatment to the service providers of the other Parties under the following three “modes” of trade in cross-border trade in services:

- a) from the territory of a party into the territory of another Party;

- b) in the territory of a Party by a person that Party to a person of another Party; and
- c) by a national of a Party in the territory of a Party

subject to the caveat that “provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment – Definitions), *in that territory*” is carved out of the definition of a cross-border trade in services.

114. The WTO General Agreement on Trade in Services (the “GATS”) covers four modes of cross border trade in services:

1. from the territory of one Member into the territory of any other Member (“cross border supply”);
2. in the territory of one Member to the service consumer of any other Member (“consumption abroad”);
3. by a service supplier of one Member, through commercial presence in the territory of any other Member (“commercial presence”); and
4. by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (“presence of natural persons”).

(Mexico’s Book of Authorities, Appendix B, Tab 12)

115. Three modes of service covered by Chapter Twelve, set out in Article 1213 (2)(a), (b) and (c) are equivalent to the “cross border supply”, “consumption abroad” and “presence of natural persons” modes under the GATS. NAFTA treats the remaining GATS mode, “commercial presence in the territory of a Member”, as investment governed by Chapter Eleven.³

e. The Tribunal failed to understand the significance of the distinction between cross-border trade in services and investment

116. The distinction between an investment and a cross-border service provider is fundamental to the proper operation of the NAFTA. The Tribunal failed to understand it.

117. The Tribunal found that the “focus” of SDMI’s business plan was to secure orders from Canadian customers for the destruction of their PCB waste and to then transport that waste to the

³ The NAFTA entered into force before the conclusion of the Uruguay Round negotiations on the General Agreement on Trade in Services (GATS).

United States where it would be destroyed in SDMI's plant in Ohio. As the Tribunal noted in its Award:

92. SDMI's interest in Canada developed in the 1990's as the U.S. market declined. Mr. Dana Myers testified that SDMI went into the Canadian market because ...that's going to extend the usefulness of our facility. It's going to extend our business. The PCB remediation business was working its way out of existence, because no new PCBs were being manufactured and the world's stockpiled inventory was decreasing as SDMI and its competitors did their work.

93. Although SDMI did give consideration to developing a treatment facility in Canada, the focus of the Canadian project was to obtain PCB waste for treatment by SDMI in its U.S. facility. It was envisaged that Canadian entities would contract for the treatment of their waste in the USA and that Myers Canada would receive a percentage of the contract as its remuneration. The business was done by marketing, customer contact, testing and assessment of oil and other like services. SDMI personnel from the USA participated in these activities.

109. This was the regulatory and policy background that confronted SDMI in 1990 when it began its efforts to obtain the necessary approvals to import electrical transformers and other equipment containing PCB wastes into the USA from Canada...

117. ...In summary, SDMI through its employees and the employees of Myers Canada, contacted Canadian PCB holders with the objective of having their PCBs remediated by SDMI using its facilities in the USA...[*Italicized emphasis in original; underlining added*]

Award, paras. 92, 93, 109, 117

118. This commercial activity falls squarely into NAFTA's definition of a cross-border trade in services, specifically, the second definition in Article 1213(2):

Cross-border provision of a service or cross-border trade in services means the provision of a service [PCB destruction services]:

(b) in the territory of a Party [in the territory of the United States] by a person of that Party [SDMI] to a person of another Party [a customer situated in Canada]... [bolding in original NAFTA text]

NAFTA, Article 1213(2)

119. As the Tribunal observed at paragraph 93, SDMI did not establish a PCB destruction plant in Canada where it would provide such a service to Canadian customers. Had it done so, SDMI would have made an investment that fell within the Article 1213(2) “investment carve-out” from the definition of cross-border trade in services.⁴ Rather, to use the Tribunal’s words, the “focus” of SDMI’s Canadian project “was to obtain PCB waste for treatment by SDMI in its U.S. facility”.

120. Mexico disagrees with the Respondent’s characterization of Article 1213(2)(b) and GATS Article I(2)(b) at paragraphs 167-169 of its Memorandum of Argument. The plain language of the NAFTA’s text contradicts the claim that only natural persons who travel to the territory of the other Party can consume a service abroad.

121. The point is established in the WTO’s “Scheduling of Initial Commitments in Trade in Services: Explanatory Note” which states:

B. How to treat the modes of supply

18. The four modes of supply listed in the schedules correspond to the scope of the GATS as set out in Article I (a). The modes are essentially defined on the basis of the origin of the service supplier and consumer, and the degree and type of territorial presence which they have at the moment the service is delivered.

(b) Consumption abroad

- This mode of supply is often referred to as “movement of the consumer”. The essential feature of this mode is that the service is delivered outside the territory of the Member making the commitment. *Often* the actual movement of the consumer is necessary as in tourism services. *However, activities such as ship repair abroad, where only the property of the consumer “moves”, or is situated abroad, are also covered.*

- Whatever the mode of supply, obligations and commitments under the Agreement relate directly to the treatment of services and service suppliers. They only relate to service consumers insofar as services or service suppliers of other Members are affected. It should be noted that a Member may only be able to impose restrictive measures affecting its own consumers, but not those of other Members, on

⁴ That provision follows the three types of cross-border services, stating:

*** but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment – Definitions), in that territory.

activities taking place outside its jurisdiction. [Underlining in original except for italicized parts]

“Scheduling of Initial Commitments in Trade in Services: Explanatory Note”, MTN.GNS/W1643 September 1993 at p. 8 (now de-restricted) (Mexico’s Book of Authorities, Appendix B, Tab 13)

122. The WTO Explanatory Note confirms that the movement of the consumer may occur but that is not the *sine qua non* of the “consumption abroad” mode’s definition. Cases in which the consumer’s property moves are also covered by this mode. The NAFTA operates in the same fashion.

f. SDMI was a would-be cross-border service provider

123. According to the architecture and plain definitions of the NAFTA, SDMI was a cross-border service provider. This was an obvious and fundamental point going to the heart of the Tribunal’s jurisdiction. Mexico and Canada made submissions to the Tribunal on this issue because it appeared that there was a danger that the Tribunal would permit an enterprise that sought to offer a cross-border service to Canadian customers could be permitted to advance a Chapter Eleven claim because it had done some marketing there and others connected to it in some fashion had made some form of investment in Canada.

Submission of the United Mexican States dated 14 January 2000 at ¶¶ 18-20 (Canada’s Book of Authorities, Appendix B, Volume II, Tab 49)

124. The Respondent argues, at paragraph 120, that Arbitrator Schwartz found that:

“There is no way of escaping the fact that S.D. Myers had an investment in Canada at least in this respect: it made a loan to an affiliate, Myers Canada. Article 1139, definition (d) of NAFTA, expressly includes as an investment a loan to an affiliate.” [Italics in Memorandum of Argument; underlining added]

125. This actually proves Mexico’s and Canada’s point: *If* SDMI made a loan to an “affiliate”(Canada disputes this at paragraph 164), its claim of an alleged breach of Chapter Eleven is against any Canadian measure that related to that loan. This type of claim, the analysis of the breach, and the potential damages that could be claimed all relate to the loan *qua* investment. However, the Tribunal allowed the claimant to bring what is in law a cross-border trade in services claim as an investment claim. *This is not permitted by the Treaty.*

126. The effect of Canada’s measure was to prevent SDMI from offering a cross-border service. *However, the NAFTA Parties did not provide for arbitration of a claim by a U.S. cross-border service provider against Canadian measure that adversely affected its ability to offer such a service.* The only recourse in such circumstances, which is the normal recourse for every

alleged breach of the NAFTA except for Section A, was for the United States to commence a Chapter Twenty panel proceeding against Canada.

127. The Myers brothers had a claim for any Canadian measure that related to their investment in Myers Canada and SDMI may have had a claim against any Canadian measure that related to a loan. But those claims are fundamentally different (in terms of standing, the nature of the investment interest, the proper analysis of the alleged violations of Chapter Eleven in relation to that interest, and any potential damages suffered) from a claim by SDMI against a Canadian measure that impeded its ability to provide a cross-border service.

128. In considering a claim against a measure of a Party that restricted the provision of cross-border trade in services, brought by a person without standing, the Tribunal acted wholly outside the scope of the submission to arbitration. This was not contemplated by the terms of the submission to arbitration. Accordingly, the Award must be set aside.

3. The Tribunal misstated and misapplied Chapter Eleven's national treatment obligation

129. The Applicant also argues that the Tribunal erred in finding a breach of Article 1102, the national treatment obligation. Mexico concurs with the Attorney General's submissions at paragraphs 160-196 of the Amended Memorandum of Argument and makes the following additional observations.

130. The territorial bases underpinning the NAFTA require tribunals to ascertain precisely what the gravamen of an alleged violation is. Article 1102 sets out two different national treatment standards:

Paragraph 1 addresses the treatment that a Party is required to accord to investors of another Party –this is to be no less favorable than the treatment it accords to its own investors.

Paragraph 2 addresses the treatment that a Party is required to accord to investments of investors of another Party –this is to be no less favorable than the treatment it accords to investments of its own investors.
[Emphasis added]

NAFTA, Article 1102(1) and (2)

131. Nowhere in the Award does the Tribunal identify which paragraph of Article 1102 it considered Canada had breached. It simply holds that Article 1102 was violated without determining whether Canada accorded less favorable treatment to the *investor* or to *the investment of the investor*.

132. What appears to have happened is that the Tribunal lumped SDMI and Myers Canada together. For example, in its discussion of the “like circumstances” test, the Tribunal states:

251. From the business perspective, it is clear that SDMI and Myers Canada were in “like circumstances” with Canadian operations such as Chem-Security and Cintec. [Emphasis added]

Award, para. 251

133. In doing so, the Tribunal misstated the governing law in Article 1102, which requires a Tribunal to distinguish between the treatment of the investor (comparing it to domestic investors “in like circumstances”) and the treatment of the investment (comparing it to domestic investments “in like circumstances”). A tribunal cannot mix the two standards of treatment together (*e.g.*, compare Canada’s treatment of an American *investor* with Canada’s treatment of Canadian *investments*).

134. This misstatement and misapplication of Article 1102 demonstrates that the Tribunal once again proceeded from a fundamental misunderstanding of the Treaty’s structure and logic. This in turn led the Tribunal to misapply the “like circumstances” test. This goes beyond mere error of law as it led the Tribunal to inject a non-existent test (*e.g.*, treatment no less favorable than that accorded to the investor *and* its investment) into the separate obligations established in paragraphs 1 and 2 of Article 1102.

United Mexican States v. Metalclad Corporation, per Tysoe J. at ¶¶ 70-71 (Canada’s Book of Authorities, Appendix B, Volume I, Tab 26)

135. This too results in a decision outside the scope of the submission to arbitration and must be set aside.

4. The Tribunal’s misstated and misapplied Article 1105

136. The Tribunal engaged in further jurisdictional error when it found, by a majority, that a breach of Article 1102 supported a subsequent finding of breach of Article 1105.⁵ As shall be seen, national treatment is a *conventional* international law obligation and a Tribunal has no jurisdiction to base a breach of Article 1105 based on such an obligation.

⁵ Arbitrator Schwartz wrote a separate opinion which set out an expansive view of the meaning of Chapter Eleven. Mexico considers his opinion to be incorrect in material respects but it is unnecessary to address it as the other Tribunal members did not concur with him.

137. Before addressing this error, however, it is necessary to point out a further error of the type previously addressed. As it did in its standing and Article 1102 determinations, the Tribunal misstated and misapplied Article 1105(1).

138. 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).

139. The plain language of Article 1105 shows that the paragraph 1 obligation extends only to investments of investors, while paragraph 2 is owed to investors of another Party *and* to investments of investors of another Party.

140. Once again, the Tribunal failed to understand this distinction. Its finding of a breach of Article 1105(1) is based on Canada's treatment of SDMI (the "investor"), not Myers Canada (the investment).

141. 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]

Award, paras. 258, 263, 264, 268

142. It is clear throughout the Tribunal's examination of Article 1105 that it was focused on the treatment of the so-called investor rather than the investment. This shows another misstatement of the Treaty and resulted in a further decision outside the scope of the submission to arbitration.

143. Turning to the second error in this part of the Award, in order to appreciate the point it is necessary for the Court to take note of the distinction between conventional and customary international law.

144. The NAFTA Parties have maintained in submissions before tribunals and have issued a recent binding interpretation of the Free Trade Commission confirming that Article 1105 refers to customary international law only and that it does not extend to conventional legal obligations that States have negotiated and implemented through treaties.

145. The distinction in public international law between customary international law and conventional (or treaty) law is the following: The former is found in the practice of States who by their conduct and statements show that they consider themselves to be bound by a rule of international law. The International Court of Justice and learned commentators speak of the need to determine the *opinio juris* of States. That is: through their practice do States show the necessary subjective element of considering themselves to be bound by an alleged customary rule of law.

See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed., (Stevens & Sons Limited: London, 1957) at pp. 38-43 (Mexico's Book of Authorities, Appendix B, Tab 14)

Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) at pp. 7-11 (Mexico's Book of Authorities, Appendix B, Tab 15)

146. The most common form of international law applied by international courts and tribunals is conventional law. This is law negotiated as a treaty which is then ratified by signatory States. The vast majority of international legal obligations are treaty obligations; in the absence of a treaty there is no obligation unless the rule has acquired the status of customary international law (or a general principle of law recognized by the courts of civilized nations).

147. The NAFTA itself is treaty law. Were NAFTA not in effect, Canada would have no international law obligation to accord national treatment to investments of investors of the United States or Mexico.

148. NAFTA incorporates in treaty text certain international legal concepts that find their origins in customary international law. The “Minimum Standard of Treatment” obligation contained in Article 1105 is the leading example. As Canada noted in its NAFTA *Statement on Implementation* issued on the date that the NAFTA entered into force:⁶

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. ...this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law... [Emphasis added]

Canada Gazette, Part I, January 1, 1994 at p. 149 (Mexico’s Book of Authorities, Appendix B, Tab 16)

149. All three NAFTA Parties have repeatedly informed tribunals that Article 1105 contains customary international law protections only. Mexico made such submissions before the Tribunal below:

28. In Mexico’s submission, Article 1105 does not expand the standard of treatment recognized in customary international law. Rather, it is a minimum standard that reflects the expectation in international law that governments will act in good faith and will not subject foreign investors to abusive or discriminatory treatment, nor fail to accord them full protection and security. (The Parties’ obligations in respect of non-discrimination are prescribed by Article 1102: National Treatment). [Emphasis added]

Submission of the United Mexican States dated 14 January 2000 at ¶28, (Canada’s Book of Authorities, Appendix B, Volume I, Tab 49)

150. The point was also made by all three NAFTA Parties in a NAFTA claim that considered the meaning of Article 1105 after the *Myers* Tribunal rendered its decision. The Parties informed the subsequent Tribunal (the *Pope & Talbot* Tribunal) that the majority of the *Myers* Tribunal had erred in their application of Article 1105. During the *Metalclad* hearing, Mexico obtained the United States’ consent to file its submission in *Pope & Talbot* before the Supreme Court of British Columbia.

151. The United States stated:

3. *** the United States disagrees with the *S.D. Myers* panel majority’s treatment of Article 1105(1). The panel majority incorrectly defines the scope of Article 1105(1) and incorrectly links Article 1102 to Article

⁶ This is an official description by Canada of the NAFTA published on January 1, 1994, the date of NAFTA’s entry into force. The President of the United States published a similar description entitled the *NAFTA Statement of Administrative Action*. Mexico did not publish such a document.

1105(1).

4. The *S.D. Myers* panel majority correctly finds that Article 1105(1) incorporates certain rules of customary international law. *S.D. Myers, Inc. v. Government of Canada* (Nov. 12, 2000) (Award) ¶262. After noting this essential point, two of the three arbitrators inexplicably ignore the logical consequences of this conclusion by suggesting that a violation of standards that do not arise out of customary international law – i.e., the standards of Article 1102 – may establish a breach of Article 1105(1).

8. ...The *S.D. Myers* arbitrators who formed the majority on this point should not have relied on authority so at variance with the NAFTA's clear direction that "fair and equitable treatment" be construed to require compliance only with customary international law obligations. Determining that alleged violations of other NAFTA obligations, whether found within or without Section A of Chapter Eleven, are caught within the ambit of Article 1105(1) would increase the scope of that provision and of Chapter Eleven as a whole beyond that contemplated by the NAFTA Parties.

9. In short, *S.D. Myers* arbitrator Chiasson was correct in concluding, as recorded in the award, as follows:

[A] finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirements of international law. Breach of another provision of the NAFTA is not a foundation for such a conclusion. The language of the NAFTA does not support the notion espoused by Dr. Mann insofar as it is considered to support a breach of Article 1105 that is based on a violation of another provision of Chapter 11. [Emphasis added]

Fifth Submission of the United States of America in *Pope & Talbot v. The Government of Canada* (Mexico's Book of Authorities, Appendix B, Tab 17)

152. Mexico also filed its own *Pope & Talbot* submission with the Supreme Court of British Columbia, stating that it too did not agree with the majority of the *S.D. Myers* Tribunal for the same reasons, that Arbitrator Chiasson was correct, and that:

Mexico submits that this Tribunal would exceed its jurisdiction if it were to include within the scope of Article 1105, obligations found in other provisions of Section A of Chapter Eleven, other Chapters of the NAFTA or treaties other than the NAFTA, or principles and objectives found in NAFTA's preambular language.

Submission of the United Mexican States in *Pope & Talbot v. The Government of Canada* (Mexico's Book of Authorities, Appendix B, Tab 18)

153. The *Pope & Talbot* Tribunal refused to give effect to the shared views of the NAFTA Parties. It formulated a manifestly incorrect and strained interpretation of Article 1105 that has since been overruled by the NAFTA Commission: see ¶ 2 of the 31 July 2001 Free Trade Commission Note of Interpretation. Tysoe J. also reviewed the *Pope & Talbot* award after counsel for Metalclad submitted it in support of its defence of the *Metalclad* Tribunal's Article 1105 interpretation.

154. Tysoe J. summarily rejected the *Pope & Talbot* award's attempt to construe fair and equitable treatment as being "additive" to international law and therefore going beyond customary international law.

United Mexican States v. Metalclad Corporation, supra at ¶ 65
(Canada's Book of Authorities, Appendix B, Volume I, Tab 26)

31 July 2001 Free Trade Commission Note of Interpretation, (Mexico's Book of Authorities, Appendix B, at Tab 19)

155. All three NAFTA Parties have endorsed Tysoe J.'s finding on this point.

Methanex Corporation v. United States of America, Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation (Mexico's Book of Authorities, Appendix B, at Tab 20)
(See also the Attorney General's Amended Memorandum of Argument at ¶ 205)

156. Leaving aside the Tribunal's confusion of the investment with the investor, although the *Myers* Tribunal correctly stated the content of Article 1105, the majority erroneously and inexplicably then concluded that a breach of a treaty obligation constituted a breach of Article 1105. As *Metalclad* shows, this can only occur if a treaty rule has gained such widespread acceptance as to also constitute a rule of customary international law. To Mexico's knowledge, there was no attempt to argue before the Tribunal that national treatment is a rule of customary international law. Any such argument would have been in error in any event because national treatment is not yet a rule of customary international law.

157. National treatment is a conventional international law concept which has been developed in international trade and investment treaties, not customary international law. National treatment in the NAFTA finds its origins in Article II of the 1947 General Agreement on Tariffs and Trade (GATT), which was the predecessor to the World Trade Organization (WTO), and in various treaties that address investment issues (such as Article 1602 of the Canada-United States Free Trade Agreement).

General Agreement on Tariffs and Trade, open for signature October 30, 1947, 55 U.N.T.S. 194, T.I.A.S. No. 1700 (Mexico's Book of

Authorities, Appendix B, Tab 21) *Canada-United States Free Trade Agreement*, (Mexico's Book of Authorities, Appendix B, Tab 22)

158. Canada and the United States incorporated language derived from GATT Article III and from bilateral investment treaties into their Free Trade Agreement (FTA). (See FTA Article 1602.) The NAFTA Parties followed suit.

159. The recent accession of the People's Republic of China to the World Trade Organization is further evidence that national treatment is not a customary rule of international law. Even though 144 States are Members of the WTO, and therefore WTO rules such as the obligation to accord national treatment to goods of other countries bind the vast majority of the international community, until China formally acceded to the WTO Agreement it was not entitled to the benefit of such rules nor was it obliged to accord such treatment to the goods of other WTO Members.

160. As noted above, during the review of the *Metalclad* award, Mexico put copies of various Article 1128 submissions, including ones made by the United States, before the Court. The Court accepted the Parties' shared view as to the content of Article 1105:

62...In using the words "international law", Article 1105 is referring to customary international law which is developed by common practices of countries. It is to be distinguished from conventional international law which is comprised in treaties entered into by countries (including provisions contained in the NAFTA other than Article 1105 and other provisions of Chapter 11).

67. In the framework of the *International CAA*, the issue is whether the Tribunal made decisions on matters beyond the scope of the submission to arbitration by deciding upon matters outside Chapter 11. In my opinion, the Tribunal did make decisions on matters beyond the scope of Chapter 11.

68. On my reading of the Award, the Tribunal did not simply interpret Article 1105 to include a minimum standard of transparency. No authority was cited or evidence introduced to establish that transparency has become part of customary international law. In the *Myers* award, one of the arbitrators wrote a separate opinion and surmised an argument that the principle of transparency and regulatory fairness was intended to have been incorporated into Article 1105. The arbitrator crafted the argument by assuming that the words "international law" in Article 1105 were not intended to have their routine meaning and should be interpreted in an expansive manner to include norms that have not yet technically passed into customary international law. However, the arbitrator did not decide the point because it had not been fully argued in the arbitration and he was not aware of the argument having been made in any earlier case law or academic literature. In my view, such an argument should fail because there is no proper basis to give the term

“international law” in Article 1105 a meaning other than its usual and ordinary meaning. [Emphasis added]

United Mexican States v. Metalclad Corporation, *supra*, at ¶¶ 62, 67, 68, (Canada’s Book of Authorities, Appendix B, Volume I, Tab 26)

161. In Mexico’s submission, the majority of the *Myers* Tribunal committed the same jurisdictional error in extending Article 1105’s reach to breaches of conventional international law.

162. As noted above, on 31 July 2001, the NAFTA Commission issued a binding interpretation as to the meaning of Article 1105. The Commission, comprising the Ministers of the three Parties acting collectively in their capacity as the highest and most authoritative interpreter of the NAFTA, issued an interpretation. Under Article 1131(2) of the NAFTA such an interpretation forms part of the governing law of a Chapter Eleven arbitration. That paragraph, entitled “Governing Law”, states that:

An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

163. The Commission stated:

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

B. Minimum Standard of Treatment in Accordance with International Law

Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1). [Emphasis

added]

(Mexico's Book of Authorities, Appendix B, Tab 18)

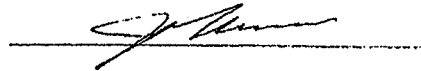
164. Paragraph 3 of the Interpretative Note is of particular importance to this review. It is respectfully submitted that this Court should set aside this part of the Award as well on the ground that the Tribunal considered matters outside the scope of the submission to arbitration.

PART IV: STATEMENT OF THE ORDER SOUGHT

165. Mexico respectfully supports the Attorney General's request for an Order setting aside the Award.

All of which is respectfully submitted.

Dated: 13 December 2001



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IV: LIST OF AUTHORITIES TO BE REFERRED TO

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), done at Washington, D.C., March 18, 1965; entry into force October 14, 1966; published in 575 U.N.T.S. 159

United Mexico States v. Metalclad Corporation, (2001), 89 B.C.L.R. (3d) 359; [2001] B.C.J. 950

Pfizer Inc. v. Canada, [1999] 4 F.C. 441 (T.D.) (appeal dismissed October 14, 1999, Docket A-469-99 (F.C.A.))

Marvin Roy Feldman v. United Mexican States, Excerpt from Interim Decision on Jurisdiction

Waste Management v. United Mexican States ("Waste Management IP"), Decision on Venue, 25 September 2001

Klöckner v. Cameroon, Decision on Annulment, 3 May 1985, 2 ICSID Reports 95

U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048

Canada (Director of Investigations and Research) v. Southam Inc., [1997] 1 S.C.R. 748

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982

Quintette Coal Ltd. v. Nippon Steel Corp., (1990), 50 B.C.L.R. (2d) 207

Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, Award on Jurisdiction, dated April 14, 1988, 3 ICSID Reports at 131

Reference re Succession of Quebec, [1998] 2 S.C.R. 217

Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342

Shalansky v. Regina Pasqua Hosp. Bd. of Gov., (1983) 145 D.L.R.

Navigation Sonomar Inc. v. Algoma Steamships Ltd., [1987] R.J.Q. 1346, 1 M.A.L.Q.R. 1 (Que. S.C.)

Pointe-Claire (City) v. (Quebec) Labour Court, [1997] 1 S.C.R. 1015

Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation

National Corn Growers Association v. Canada, [1990] 2 S.C.R. 1324

Vacuum Salt Products Limited v. Ghana, 4 ICSID Reports 329