

FEDERAL COURT - 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

INTERVENOR

RESPONDENT'S REPLY TO THE INTERVENOR'S
MEMORANDUM OF FACT AND LAW

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**REPLY SUBMISSION OF S.D. MYERS, INC.
TO THE SUBMISSIONS OF THE INTERVENOR
THE UNITED MEXICAN STATES**

Part 1: FACTS

1. This is the reply submission of the Respondent, S.D. Myers, Inc. ("SDMI"), to the Memorandum of Fact and Law of the Intervenor, the United Mexican States ("Mexico").

2. Mexico applied for, and with the consent of both Canada and SDMI, was given leave by the Honourable the Associate Chief Justice to intervene in these proceedings to make submissions on three specific issues:
 - a. The appropriate standard of review by this Honourable Court of the decision of the Arbitral Tribunal under Review;
 - b. The jurisdiction of the Arbitral Tribunal; and
 - c. The interpretation of the NAFTA.

Mexico was specifically not permitted to either lead evidence or to challenge the factual findings of the Arbitral Tribunal.

Part 2: POINTS IN ISSUE

3. The Memorandum of Fact and Law filed by Mexico has far exceeded the permitted scope of Mexico's intervention and ought, to that extent, to be disregarded.

4. Otherwise, SDMI accepts, for the purposes of this reply, the Points in Issue as framed by Mexico.

Part 3: SUBMISSIONS

5. SDMI repeats and relies upon its Memorandum of Fact and Law filed with this Honourable Court in December 2001, and will confine this submission to only those matters raised by Mexico which require clarification or response.

Issue 1: Mexico has exceeded the scope of permitted intervention

6. The role of an intervenor is to provide a different perspective on the proceedings to assist the Court. It is not to merely reiterate the position taken by another party (*Abbott v. Canada*, [2000] 3 F.C. 482 (Fed. Proth.)). The limits of an intervenor's participation are defined by the order made granting such status (*Canada (Information Commissioner) v. Canada (Min. of Industry)* (1999), 166 F.T.R. 299 (Fed. T.D.)).

7. An intervenor cannot raise issues not argued or raised by the parties (*Canada (Information Commissioner) v. Canada (Min. of Public Works)*, [1997] 1 F.C. 164 (Fed. T.D.)).

8. Mexico had a strictly limited right of participation before the Arbitral Tribunal at the hearing on the merits. That right derives from NAFTA Article 1128, which limits non-disputing Parties (in this case, Mexico and the United States of America), to file "submissions to a Tribunal on a question of interpretation of this Agreement." Otherwise, non-disputing Parties have no right to participate. In particular, under the UNCITRAL Arbitration Rules (the governing rules in the present case), the Tribunal has no jurisdiction to permit third party strangers to the arbitration to intervene in it:

Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration. As a procedural provision, however, it cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party. Likewise, the Tribunal can have no power to accord to any third person the substantive rights of NAFTA Parties under Article 1128 of NAFTA. (*Methanex v. United States of America*, Decision on Amici Curiae, January 15, 2001)

9. Mexico did not seek, and was not granted, leave to intervene with respect to the merits of the Award, a matter on which there is no *lis* between Mexico and the claimant, and a matter in which Mexico has no legal or practical interest. Despite that fact, Mexico has gone well beyond what was permitted by the order of the Associate Chief Justice and sought to bolster Canada's case, without offering a new or helpful perspective (except in those circumstances where it has attempted to raise new issues not raised by Canada and not in issue in this proceeding, which is

also beyond the proper scope of its participation). It is apparent that Mexico is attempting to reargue the merits of the case, which neither it nor Canada should be permitted to do on this application for review. In particular, it is respectfully submitted that this Honourable Court ought not to receive submissions from Mexico with respect to either the facts as found by the Tribunal or the application of the applicable law to the facts. Mexico ought instead to be strictly confined to addressing the matters enumerated by the Associate Chief Justice. Specific objectionable submissions are identified below.

Issue 2: Mexico has misstated the Applicable Standard of Review

10. At its essence, Mexico's submission concerning the applicable standard of review by this Honourable Court under the provisions of the *Commercial Arbitration Act* and *Code* is that this Court should disregard the approach consistently taken by Canadian Courts in applying Article 34(2)(a)(iii) of the *Code* (or analogous provisions under comparable legislation), should ignore principles of international comity and the impact that its approach would have on Canada's role as a participant in international arbitral proceedings, and should give no weight to the underlying principles and objectives which culminated in the drafting of the UNCITRAL Model Law and the adoption of the *Commercial Arbitration Act* and *Code*. Only by doing so is Mexico able to urge this Court to apply the "pragmatic and functional analysis", and then, assuming the Court does so, to argue that the application of that analysis will yield a "correctness" test on applications to set aside Arbitral Awards issued under NAFTA Chapter 11.

11. Fundamental to Mexico's analysis is its consideration of the decision of Tysoe J. in *Metalclad v. United Mexican States* (2001), 89 B.C.L.R. (3d) 359 (S.C), the only other Canadian authority dealing with an application to set aside a NAFTA Chapter 11 arbitral award. It is therefore essential to consider the Court's analysis in that case, as it is respectfully submitted that it does not in any respect support the position advanced by Mexico.

12. For instance, while Mexico urges that Tysoe J. determined that the principles discussed in the cases applying the pragmatic and functional analysis to domestic tribunals "will be of assistance" in applying the provisions of the *Code* (Mexico, para. 31), that does not accurately

state what Tysoe J. held. Indeed, his holding noted that the approach urged by Mexico *has not* been utilized in Canada. He said:

With respect to the *International CAA*, it is my view that the standard of review is set out in ss. 5 and 34 of that *Act* 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. It may be 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 but the "pragmatic and functional approach" cannot be used to create a standard of review not provided for in the *International CAA*. I note that since the pragmatic and functional approach" was fully articulated by the Supreme Court of Canada...the approach *has not* been utilized in Canadian cases involving international commercial arbitrations....[emphasis added, citations omitted]. (*Metalclad*, para. 54)

13. Despite this clear statement of the proper approach to an application such as this, Mexico repeatedly suggests in its submission that Tysoe J. applied a "correctness standard" to "jurisdictional matters" (for instance, para. 46, para. 60, para. 96). A careful reading of the reasons for judgment demonstrates this is not the case.

14. Tysoe J. commenced his analysis by noting that, under the provisions of the *International Commercial Arbitration Act*, a court *must not* intervene unless so provided by the *Act* and that the Award *may only* be set aside on the specified bases. Analogous language appears in the *Code* which governs the case at bar.

15. He then reviewed the authorities, and, considering the specific ground of review in issue in this case said:

In concluding that the arbitrators in that case [*Quintette Coal Limited v. Nippon Steel Corporation*, [1991] 1 W.W.R. 219 (B.C.C.A.)] did not decide on matters beyond the scope of the submission to arbitration, Gibbs J.A. said the following:

They were called upon to construe cls. 7 and 9 of the contract within their context and they did so. Even applying the domestic test (*Shalansky v. Regina Pasqua Hosp. Board of Gov.* [citation omitted]), their interpretation is one which the words of the contract can reasonably bear....

Counsel for Mexico submits that in making reference to the domestic test, Gibbs J.A. left open the question of review under s. 34(2)(a)(iv) on the basis of the

domestic standard for patently unreasonable error. I do not agree. What Gibbs J.A. meant was that even if the domestic test applied (which it did not), it was still not shown that the award should be set aside because the arbitrators' interpretation of the contract was not unreasonable. (*Metalclad*, para. 52)

16. The learned Judge then went on to reject the submission of Mexico that a standard of "correctness" applies to the review of "jurisdictional" matters. Indeed, Tysoe J. rejected the very notion of "jurisdictional error" as an applicable concept under the *International CAA*, referring to it as a "somewhat artificially applied test". He said:

During the course of their submissions, counsel made reference in general to the issue of whether the Tribunal exceeded its jurisdiction. The concept of "excess of jurisdiction" is the standard which was previously applied to decisions of administrative tribunals and arbitral bodies. The *International CAA* does not utilize the term "excess of jurisdiction" or the like but, instead, sets out with particularity the grounds on which the court may set aside an arbitral award. (*Metalclad*, para. 55)

17. To put the matter beyond doubt, Tysoe J. expressly made clear that even if the Tribunal being reviewed was wrong in their approach or legal analysis, that would not justify setting aside the Award as being outside the scope of the submission to arbitration. Thus, in considering a possible approach to Article 1105, identified (although not adopted) by the minority in the separate opinion in the present case, Tysoe J. specifically noted that

...it may be argued that the court would have no ability to set the award aside under the *International CAA* if the arbitrator had based the award on that argument. While the interpretation of Article 1105 would have been flawed, it may be that the arbitrator would not have decided a matter outside the scope of the submission to arbitration. (para. 69)

This clearly demonstrates that a correctness standard was not being applied.

18. Indeed, it is respectfully submitted that the analysis urged by Mexico of review on the basis of correctness, or alternatively reasonableness, or alternatively patent unreasonableness, poses the wrong question. While Mexico seeks to distinguish between "standard of review" and "grounds of review", that distinction cannot be used to obscure the fact that the Court is only entitled to intervene on the specific grounds set out in the statute. That requires an understanding of how one identifies the "scope of the submission to arbitration".

19. The decision in *Quinette* is instructive in that respect. In the passage quoted in paragraph 15 above, Gibbs J.A. was called upon to determine whether a matter was beyond the scope of the submission to arbitration. He held that the scope of the submission to arbitration was defined by:

- (1) the notice of request for arbitration;
- (2) the contract between the parties; and
- (3) the pleadings exchanged between the parties.

By analogy, in the case at bar, the scope of submission to arbitration is defined by:

- (1) the Notice of Intent to Submit a Claim and Notice of Arbitration;
- (2) the NAFTA, and in particular Chapter 11; and
- (3) the Statement of Claim and Statement of Defence.

20. It is notable that in *Quinette*, the scope of the submission to arbitration is examined without any reference to "correctness" or "patent unreasonableness" or some other standard applicable to domestic tribunals.

21. So, in that case, the Tribunal was called upon to construe particular clauses in an agreement. Having regard to the principles of comity reflected throughout the jurisprudence to which Gibbs J.A. referred, he concluded that whether the Tribunal was right or wrong in their interpretation of those clauses, the task was theirs to undertake, and they ought to be accorded the greatest deference. The analogy of course to the present case is that in the case at bar, the task assigned to the Tribunal was to construe particular provisions of Chapter 11. Whether right or wrong in their interpretation (and it is submitted that the Tribunal's interpretations were correct), this Court ought not to interfere.

22. The *Ethyl v. Canada* Award on Jurisdiction is also helpful in defining the meaning of the "scope of the submission to arbitration" under Article 34(2)(a)(iii) of the Code. In *Ethyl*, the Tribunal noted that the concept of "scope" relates to whether the claim at issue is within the "type of claim" that Canada consented to under NAFTA Chapter 11. The *Ethyl* Tribunal stated:

The fundamental jurisdictional issue here, therefore, is whether Canada has consented to this arbitration. It has two aspects, as the jurisdictional proceedings have underscored. One is the aspect of scope: is *Ethyl's* claim within the types of

claims that Canada has consented in Chapter 11 to arbitrate? The other aspect is that of conditions to consent: To what extent, if any, is Canada's consent to arbitration in Chapter 11 conditioned absolutely on the fulfilment of specified procedural requirements at a given time? (Para. 60, Emphasis added)

It is in the context of the second aspect of jurisdiction, with respect to conditions of consent required under NAFTA Article 1121, that the *Waste Management Tribunal* rendered its award cited by Mexico at para. 24 of its submission. There is no reference in either the *Ethyl* or the *Waste Management* jurisdiction awards to the domestic standards of review enumerated by Mexico in its submission. The standard is clearly not one of "correctness" as argued by Mexico.

23. Mexico's repeated references to "jurisdiction", and its entire analysis of the standard of review issue, seem to be a disguised attempt to revive, in a context in which it was never intended to apply, the "preliminary question" analysis. It does so despite the thorough discrediting of that approach even on applications for judicial review of domestic tribunal decisions.

The Courts have firmly rejected some previous attempts to define in purely conceptual terms the statutory provisions that an agency had to decide correctly. Specifically, such concepts as "preliminary" and "collateral" proved entirely illusory in practice, and when pressed to their logical conclusion, tended to reduce the role of a specialist administrative agency to that of a finder of fact with limited discretionary powers. (Brown and Evans, *Judicial Review of Administrative Action*, p. 14-26)

24. Finally, the position advocated by Mexico would lead to uncertainty and inconsistency. While Mexico asserts that it takes "no issue with the general approach taken in Canadian law to review of arbitrations" between private parties to international commercial arbitration agreements, it advocates that a different standard should apply in the present case where one of the parties is a state.

25. That is a matter for Parliament, and on which Parliament has clearly spoken. Parliament could have determined that applications to set aside awards of NAFTA Chapter 11 Tribunals were to proceed under legislation where different grounds of review applied. Instead, it chose to subject such awards to review only on the grounds set out in the *Commercial Arbitration Act* and

Code, with its well established jurisprudential history. The approach advocated by Mexico would necessarily have this Honourable Court apply a different standard of review to different arbitrations being reviewed under the same provisions of the same *Code*, depending on the particular reviewing Court's consideration of where upon the spectrum, based upon the identity of the parties, the application of the pragmatic and functional analysis would determine the applicable standard of review to fall. Such an approach would not promote certainty in the review of international commercial arbitrations under the *Code*.

Issue 3: The Determination that SDMI was an Investor was not outside the scope of submission to Arbitration.

26. Strictly speaking, the submissions advanced by Mexico at paragraphs 82 through 96 are beyond the scope of the order of the Associate Chief Justice granting Mexico leave to intervene. Regardless, they cannot be supported.

A. SDMI was an Investor with an Investment was within the scope of submission to arbitration.

27. As is clear from the pleadings before the Tribunal, the question whether SDMI was an Investor was squarely submitted by the parties for a decision by the Tribunal. SDMI submitted in its Statement of Claim that it was an investor, and Canada itself specifically submitted at paragraph 2(a) of its Statement of Defence (by way of defence and not jurisdictional objection), that SDMI "had no 'investment' in Canada". It articulated the specific point in issue in the arbitration by saying that

Canada says that neither the operations of Myers "in Canada alone" nor the alleged "joint venture" satisfy the NAFTA requirements for an "investment".

28. Paragraph 6 of the Partial Award further sets out Canada's position before the Tribunal: Canada denies that SDMI was an "Investor" or that it owned an "Investment" in Canada as defined in the NAFTA.

29. The point was fully argued before the Tribunal, which gave a reasoned award. That Mexico now chooses to support Canada and assert that the Tribunal should not have found as it

did does not convert what was otherwise clearly submitted to the Tribunal for determination (ie. the question whether, on the facts and evidence and the Tribunal's determination of the applicable law, SDMI was an Investor within the meaning of Article 1139 of Chapter 11) into a matter that was beyond the scope of that submission.

30. Regardless, Mexico must, as a necessary underpinning of its analysis, ignore the factual findings of the Tribunal and conduct the legal analysis backwards. Mexico asserts that the starting point for determining whether an investor has standing to advance a claim is to identify with specificity the "investment" in issue.

31. There is no logic in that approach, particularly when the NAFTA specifically allows that a claim may be brought even if an investment has not yet been made.

32. Rather, the analysis must start with the language of Article 1116, under which this claim was brought, and the question of whether the claimant is a Disputing Investor. Article 1139 defines Disputing Investor as "an investor that makes a claim under section B." There being no question that SDMI was making a claim under section B, the next question is whether SDMI was an Investor of a Party. Article 1139 defines Investor of a Party as a "national or an enterprise of such Party, that seeks to make, is making or has made an Investment". Thus, if a national of a party seeks to make, is making or has made an investment (as broadly defined in article 1139), then they may submit a claim to arbitration under Article 1116, alleging a breach of an obligation under Section A of Chapter 11, and that the Investor has suffered damage as a result. The identity of the investment or investments is a question for the Tribunal which will ultimately be resolved by it, to the extent it is necessary to do so, on the Tribunal's appreciation of the evidence and interpretation of the Treaty as it considers the damages phase of the proceeding. Indeed, the interpretation of Chapter 11 of the NAFTA and the determination of whether the Investor has an Investment is a central question that is submitted to the Tribunal for determination. It is impossible to assert that the Tribunal's answer to that question is beyond the scope of the submission.

33. It is not surprising that Mexico is unable to point to any authority in support of its analysis. Given the breadth of interests that may amount to investments, and that, as in the present case, an investor may have an investment in multiple ways (such as by loan, by carrying on an enterprise, by an entitlement to profits, by equity, by debt, by the commitment of capital, etc.), and that investments may be made in the past, the present or the future, the Tribunal was clearly correct in determining that the scope of the investment in issue was something that might be relevant to the damages phase. For purposes of establishing liability, the question remitted to the Tribunal was that which they answered - was SDMI an investor, and did it have an investment.

B. Mexico's submission ignores the Tribunal's factual findings

34. Moreover, the submission of Mexico ignores the fact that the Tribunal accepted the evidence of Dana Myers, explaining the relationship between SDMI and Myers Canada:

Okay. Here's how we operate. S.D. Myers was the big portion of our business. We were trying to expand into other countries, and so we would set up these other companies because it's better to have a local presence in these companies countries. I'm sorry.

Specifically, I think it was [in] my position as President of S.D. Myers, Inc. that I exercised control over all these other places because all these other places were basically just an offshoot or an outpost of S.D. Myers, Inc. to do business around the world. (Award, A.R. v.1, p. 63)

35. Whether SDMI was an Investor with an Investment is simply a factual determination that was properly within the Tribunal's domain. Even if it were a question of mixed fact and law, it would still be beyond the scope of any review. It was one of the very questions the Tribunal was called upon to determine. While Canada and Mexico may disagree with the finding by the Tribunal, their disagreement cannot convert the Tribunal's finding on a matter submitted to it for determination into a matter beyond the scope of the submission.

C. The Tribunal did not "Remedy a Defect in Standing"

36. Mexico's submission at paragraphs 89 through 94 is, with the greatest respect, disingenuous. There, Mexico attempts to characterize the rejection of a submission advanced by Canada as an act of legislation by the Tribunal. It was nothing of the sort. Canada advanced an

argument that the Tribunal did not accept - that the claim should fail because of the corporate structure the Claimant adopted. The rejection of that submission cannot logically lead to the conclusion that the Tribunal was remedying a defect in standing. Indeed, if the quote is read in its entirety, it is apparent that the Tribunal was doing nothing of the sort. It simply was holding, as a matter of fact, that the Investor indeed had an investment in Canada:

Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure *adopted by the Claimant* [ie. SDMI] in order to organize the way in which it conducts its business affairs. *The Tribunal's view is reinforced by the use of the word "indirectly" in the second of the definitions quoted above.* [emphasis added] (Award, A.R. v. 1, p. 65, para. 229)

37. The Tribunal's conclusion is clearly stated at para. 231:

On the evidence and on the basis of its interpretation of the NAFTA, the Tribunal concludes that SDMI was an "investor" for the purposes of Chapter 11 of the NAFTA and that Myers Canada was an "investment".

Issue 2: Cross Border Services

38. Mexico again seeks to make submissions on a matter not properly before this Honourable Court. The entirety of the submission advanced by Mexico at paragraphs 97 through 128 is a matter upon which the Tribunal has not yet rendered its decision, that issue having been deferred to the damages phase of the proceeding.

39. To the extent that the submission being advanced by Mexico is that a matter that relates to goods (Chapter 3) or services (Chapter 12) cannot also relate to investment (Chapter 11), there is no basis upon which that submission can be sustained, and the Tribunal was entirely correct in applying the well established WTO and NAFTA jurisprudence that obligations are cumulative and all must be complied with simultaneously unless there is conflict, in which case the Treaty has specific provisions for the resolution of such conflict (A.R. v. 1, p. 80 par. 291-2). The Tribunal noted that this approach has been adopted by another NAFTA Tribunal, in *Pope and Talbot*, and that the reasoning was "sound and compelling". Mexico has provided no authority that would support a contrary interpretation.

40. It is common ground that there is no conflict between Chapters 11 and 12.

41. To the extent that the issue Mexico is raising is whether the cross border supply of services involves an investment, the Tribunal held:

This latter issue has not been addressed fully by the Disputing Parties and may be of more significance to a consideration of damages. The Tribunal finds it not relevant to liability in this case. (Award, A.R. p. 82, par. 300)

42. While Mexico submits at paragraph 101 that measures relating to investment may be subject to a Chapter 11 claim, whereas measures relating to cross border services may not, that is not in fact correct. It may be that measures relating solely to cross border services that do not also relate to investment may not be subject to a Chapter 11 claim, but where the measure relates to both, a Chapter 11 claim is clearly permitted.

43. Thus, Mexico's submission at paragraph 102 is incorrect, to the extent that those disputes also relate to (i.e. affect) investments of investors. In that circumstance, they are coextensively actionable under Chapter 11.

44. The essence of Mexico's submission appears to be that a Tribunal is obliged to assign a claimant to either Chapter 11 (if they are an investor), or Chapter 12 (if they are a cross border service provider), but that one cannot be both an investor and a cross border service provider. Again, the text of the Treaty and the authorities do not support that proposition and it is therefore not surprising that Mexico cites no case authority supporting it, nor does it suggest any legitimate basis upon which to disregard the analysis that measures may have multiple aspects.

45. Indeed, it also ignores the structure and architecture of the Treaty. Chapter 11 applies to *measures* that relate to investors and investment. Chapter 12 applies to *measures* that relate to cross border trade in services. They exist coextensively. Neither limits the ability of an investor to also be a provider of services, or a service provider to also be an investor. Nowhere in the Treaty is there a requirement to make such a distinction. Were such an interpretation adopted, the ambit of each chapter would be changed from its application to measures, to its application to

specific entities. That is not what the language of the Treaty contemplates.

Issue 3: The Tribunal did not err in its analysis of Article 1102 - National Treatment

46. To the extent that Mexico makes submissions concerning the proper statement of the national treatment obligation, then those submissions are within the scope of the order of the Associate Chief Justice granting leave to intervene. To the extent that they relate to the application of that test to the facts in dispute, they are beyond the scope of the order and ought to be disregarded. In any event, as Mexico adds no new substantive argument and ignores the considerable body of law referred to by the Tribunal and submitted by SDMI, SDMI relies upon the submissions contained in its original Memorandum of Fact and Law.

Issue 4: Treatment in Accordance with International Law - Article 1105

47. To the extent that Mexico raises, in paragraphs 137 through 142, a new issue not raised by Canada in its submission, that argument is not properly before the Court and must be disregarded. In any event, the submission that the Tribunal erred in its understanding of the scope of Article 1105 is not tenable when the reasons for judgment are examined as a whole. The simple fact is that harm to an investment causes harm to an investor. And, the treatment that is in issue in the present case (the issuance of the interim and final orders) was the same treatment for each of the investor and its investment. The Tribunal properly focused its attention on the treatment and then concluded that treatment violated the obligation.

48. Mexico's second submission in connection with Article 1105 again requires this Court to disregard what the Tribunal actually decided. Mexico's submission, when carefully examined, cannot be maintained. Even if there were legal merit to the position advanced, that alone would not meet the very high standard required for intervention by this Court.

49. Mexico appears to base its submission on two points:

- a. The Tribunal found that a breach of one provision of the NAFTA in and of itself established a breach of Article 1105 and this was a necessary part of its reasoning; and

- b. Properly interpreted, NAFTA Article 1105 only incorporates the customary international law minimum standard of treatment of aliens and does not include conventional or treaty law within the words "international law". In connection with this argument, Mexico relies upon the "interpretive statement" issued by the trade ministers of Canada, Mexico and the United States, subsequent to the Award in this proceeding being issued.

50. The first point, as a matter of fact, is simply incorrect. The Tribunal held 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. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also *take into account* any specific rules of international law that are applicable to the case. (Award, A.R. v.1, p. 73, para. 263) [emphasis added]

51. The Tribunal was clear that it was not deciding that a breach of one provision of the NAFTA was, *per se*, a breach of Article 1105. Rather, while the Tribunal held that fact may weigh heavily in finding a breach of Article 1105, it was not necessary to so conclude, given that "on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well." In that regard, the Tribunal was simply concluding that Canada's actions, as a matter of fact, had risen to the level "that is unacceptable from the international perspective." When Mexico asserts that "the majority erroneously and inexplicably then concluded that a breach of a treaty obligation constituted a breach of Article 1105" (par. 156), that submission requires a reading of the Tribunal's ruling that is inconsistent with the plain meaning of the words used.

52. The second submission, to which Mexico devotes the majority of its analysis, demonstrates clearly the dangers of this Honourable Court interfering with an Award of a Tribunal such as this. Mexico premises its analysis on the assertion, stated as fact, that Article 1105 includes only customary international law, and not treaty law. With respect, it is not at all clear that Mexico's interpretation is correct.

53. Mexico asserts that "all three NAFTA Parties have repeatedly informed tribunals that Article 1105 contains customary international law protections only". While Mexico may have made submissions to that effect in various Chapter 11 proceedings, the significant point is that the Tribunals have not accepted those submission. Thus, the Panel in *Pope and Talbot* explicitly rejected them, and the Panel in *Myers* would be perfectly within its competence to do so as well.

54. In support of its position, Mexico included with its authorities a copy of a reply submission made by the United States in the *Methanex* case, where some of the United States arguments on this point are set out. While the weight to be attached to a submission of a Party to a different Tribunal in a different case might reasonably be doubted, it is significant that Mexico failed to provide either the submission of *Methanex*, to which the United States was responding, or the opinion of one of international law's most noted scholars, Sir Robert Jennings, QC, (Emeritus Whewell Professor of International Law at Cambridge University, former President of both the International Court of Justice and the Institut de Droit International) on that very point. For completeness, SDMI has included those documents with its authorities. The opinion of Sir Robert is significant as Article 38 of the *Statute of the International Court of Justice* provides that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are to be used as means of determining the applicable rules of international law. The submissions of a Party to a Treaty do not have comparable status.

55. Writing with respect to the specific statement of the Free Trade Commission, Sir Robert addressed the suggestion by the Free Trade Commission upon which Mexico now relies that:

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.

Sir Robert responded:

The trouble with this proposition is just that Article 1105(1) in fact prescribes nothing of the sort. The Article nowhere mentions 'allens'; nor indeed does any other article of Chapter 11 of the NAFTA Agreement. Article 1105 is not about aliens but about "Investments of investors of another Party"...

Finally, on this first proposition of the Free Trade Commission, it is an ingenious diversion inviting examination of the complicated area of the general international

law concerning the treatment of aliens. But this is not what Article 1105 is about. It is about the minimum treatment of the investments of an investor of another Party to the NAFTA Agreement. Article 1105 does not anywhere mention either the term 'customary' or the term 'alien'. The first proposition of the Free Trade Commission, far from interpreting Article 1105(1), simply tries to substitute for the express terms of Article 1105 an altogether different standard.

56. Sir Robert also noted the weakness of the position advocated by Mexico limiting Article 1105 to "customary" rather than the full body of international law, in that the word "customary", upon which Mexico seeks to rely, was a mere interpolation by the Commission not found anywhere in the text. In that regard it is instructive to note that in the submission of Methanex, reference is made to the fact that previous drafts of the NAFTA text included the word "customary", but it was taken out of the final draft.

57. Finally, Mexico relies upon paragraph 3 of the Commission Statement, to the effect that:
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)

With respect to that statement, Sir Robert said:

This again is a curious statement to find under the Commission's Heading of "Minimum Standard of Treatment in Accordance with International Law." A determination that there has been a breach of another provision of NAFTA - presumably a determination by some court or tribunal competent to make the determination - might or might not establish that there has also been a breach of Article 1105(1). One would need to consult the actual terms of the determination as well as the two provisions in question. And while a breach of another provision of NAFTA or a separate agreement may not be sufficient in all circumstances to establish a breach of Article 1105(1), such a breach must surely be relevant evidence concerning whether an investment has received fair and equitable treatment. The Free Trade Commission does not contend otherwise, and it is thus difficult to understand the utility of this portion of the interpretation.

The Tribunal below did nothing more than conduct the analysis Sir Robert suggests is appropriate.

58. While the primary submission made by SDMI is that the position advanced by Mexico

ought not to be adopted as it is not the better interpretation of the Treaty, it is submitted that it is evident why the *Commercial Arbitration Code* has been drafted in such a way as to strictly limit the intervention of the Court. It is not, and should not be, the role of a domestic court to resolve what may be a contentious point at international law. The only appropriate place for such a determination is before Arbitral Tribunals specifically constituted to address such issues.

Part 4: ORDER SOUGHT

59. That the application to set aside the Partial Award of the Arbitral Tribunal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Counsel

January 16, 2002

PART 5: LIST OF AUTHORITIES

Cases

- Abbot v. Canada*, [2000] 3 F.C. 482 (Fed. Proth.)
- Canada (Information Commissioner) v. Canada (Min. of Industry)* (1999), 166 F.T.R. 299 (Fed. T.D.)
- Canada (Information Commissioner) v. Canada (Min. of Public Works)*, [1997] 1 F.C. 164 (Fed. T.D.)
- Ethyl Corporation v. Canada*, Award on Jurisdiction, June 24, 1998 (NAFTA Tribunal)
- Metalclad v. United Mexican States* (2001), 89 B.C.L.R. (3d) 359 (S.C.)
- Methanex v. United States of America*, Decision on Amici Curiae, January 15, 2001 (NAFTA Tribunal)
- Quintene Coal Limited v. Nippon Steel Corporation* (1990), 50 B.C.L.R. (2d) 207, [1991] 1 W.W.R. 219 (C.A.)

Texts

D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action* (Toronto: Canvasback Publishing, looseleaf), pp. 14-24 to 14-28

International Materials

Submissions of Methanex Corporation on NAFTA Free Trade Commission's July 31, 2001 interpretation of NAFTA Article 1105, dated September 18, 2001

Opinion of Sir Robert Jennings, Q.C. on the meaning of Article 1105 of the NAFTA Agreement, dated September 6, 2001

Statute of the International Court of Justice, Article 38