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RE: *S.D. Myers vs. Government of Canada*

Submission of the United Mexican States
(Damages Phase)

1. The United Mexican States (Mexico) makes this submission pursuant to NAFTA Article 1128 and the Tribunal's directions given by letter dated June 24, 2001.
2. This submission does not address all interpretative issues that may arise in this phase of the proceeding. To the extent that it does not discuss certain issues, Mexico's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.
3. Mexico concurs generally in Canada's submissions in Part D of its Counter-Memorial in the Damages Phase and will limit these further submissions to three issues:
 - a) the jurisdictional importance of distinguishing between Chapter Eleven (Investment) and Chapter Twelve (Cross-Border Trade in Services);
 - b) the distinction between claims made pursuant to Article 1116 and claims made pursuant to Article 1117; and
 - c) the definition of investment under Article 1139.

A. The Jurisdictional Importance of Distinguishing Between Chapter Eleven (Investment) and Chapter Twelve (Cross-border Trade in Services)

 1. **This claim appears to involve an investment aimed at facilitating cross-border trade in services**
4. Mexico has observed that if SDMI was an investor and Myers Canada was its investment, the purpose of the investment in Canada seemed to be to facilitate sales and marketing of

SDMI's PCB destruction services located in the United States¹. In its Partial Award, the Tribunal held, *inter alia*, that S.D. Myers Canada Inc. (Myers Canada) is an investment of S.D. Myers, Inc. (SDMI).

5. As between the disputing parties it seems to be common ground that Myers Canada, the investment, provided certain sales and administrative services to assist SDMI, the investor, to offer PCB waste destruction services at the investor's facility in the territory of the United States. Insofar as the PCB destruction service was concerned, as shall be seen below, it seems plain that this was a cross-border service.

6. It also seems to be common ground that SDMI undertook its own sales and marketing activities in the territory of Canada, independently of the investment, for the purpose of offering PCB waste destruction services at its facilities in the territory of the United States.

7. To the extent that SDMI made an investment in Canada, it appears to have been a limited one designed to facilitate orders for the provision of services in the United States.

2. The claimant's damages submissions do not comport with NAFTA's distinction between investments and cross-border trade in services

8. Mexico respectfully reiterates and reaffirms its submissions in paragraphs 11 to 21 of its first submission², and in paragraphs 32 to 40 of its supplementary submission³, in the Liability Phase.

9. Mexico respectfully suggests that the claimant's submissions on the damages that it claims to have suffered illustrates the significance of the point that Mexico made previously. The claimant's lumping together of the American investor/would-be cross-border service provider and its Canadian investment as if it were a single entity for the purposes of making out its damages claim is contrary to the NAFTA's structure.

10. The NAFTA has a particular architecture derived from its provisions' focus on the different territories of the three Parties. It requires tribunals to pay careful attention to the nature of the commercial activity that is being provided and in whose territory such activity occurs. This is of crucial importance because it both delineates the jurisdiction conferred upon Chapter Eleven tribunals and establishes how liability and damages are to be ascertained.

¹ At paragraph 20 of its submission, Mexico commented: "The defies activity of Myers-services" expressly excludes "the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment - Definitions), in that territory". Accordingly, if the primary business measure complained of Canada was to act as an agent or facilitator for the provision of PCB waste disposal services by Myers-USA (or any other US-based operator), it can be seen Chapter eleven applies only to the extent that the notion of "cross-border trade in" relate to" Myers-Canada in that capacity. It does not give rise to any obligation in connection with services that Myers-USA sought to provide in the United States to prospective customers possessing PCB waste in Canada.

² Submission of the United Mexican States dated 14 January 2000.

³ Submission of the United Mexican States dated 16 February 2000.

11. The judgment of the British Columbia Supreme Court in *The United Mexican States v. Metalclad Corporation*⁴ shows that even a NAFTA tribunal which had jurisdiction over what was clearly an investment can act outside the scope of the submission to arbitration if it applies other sections of the NAFTA in place of the applicable law (Section A and applicable rules of international law as stated in Article 1131(1)). In that case, the NAFTA tribunal erred by applying principles of transparency not found in Article 1105 (and Section A of Chapter Eleven) to support a finding of breach of Articles 1105 and 1110.

3. Assuming that there is an investment, can losses alleged to have been suffered by a U.S.-based would-be cross-border service provider be compensable under Chapter Eleven?

12. The limits on the Tribunal’s jurisdiction in the instant case arise from the fact that the investment in Canada sought to facilitate the investor’s cross-border supply of PCB destruction services from the United States. The investment in the territory of Canada appears to Mexico to have been to provide sales and marketing support for a U.S.-based service provider. If so, certain legal issues arise in the approach that the Tribunal must take to the damages issue.

13. The Tribunal will recall that NAFTA Article 1213 defines the cross-border provision of a service or cross-border trade in services through three forms of service delivery but expressly excludes:

...the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment – Definitions), in that territory.

14. The significance of this definition is that if a commercial activity falls within one of the three defined forms of services delivery, then by operation of Articles 1213, 1101, 1116, 1117 and Article 1112(1) (the Investment Chapter’s “under-ride” provision which establishes that in the event of any inconsistency between Chapter Eleven and another Chapter, “the other Chapter shall prevail to the extent of the inconsistency”), no Chapter Eleven claim can be advanced in relation to that commercial activity. Chapter Eleven claims can only be advanced in respect of those interests defined as “investments” in Article 1139. The three forms of cross-border services defined in Article 1213 are not investments.

15. In Mexico’s view, the Tribunal must consider whether SDMI falls into the second form of service-provider set out in Article 1213, and if so, what the jurisdictional and legal consequences of that determination are. Article 1213 states:

cross-border provision of a service or cross-border trade in services means the provision of a service:...

(b) in the territory of a Party by a person of that Party to a person of another Party; ..
[bolding in original]

⁴ The Reasons for Judgment of the Hon. Mr. Justice Tysoe, B.C.S.C., Vancouver Registry No. L002904.

16. Applying that definition, it appears to Mexico that the cross-border provision of a service would have occurred on the facts of this case through the provision of a PCB destruction service:

(b) in the territory of a Party [the United States] by a person of that Party [SDMI] to a person of another Party [the Canadian customer who had shipped PCB waste to Ohio for destruction there];

17. Had the NAFTA Parties intended cross-border service-providers to be entitled to commence arbitral claims against measures of another Party that adversely affected their ability to provide such services, they would have so provided. They did not (except in the special case of financial services, where Chapter Fourteen incorporates certain Chapter Eleven protections and the investor-State mechanism into the Financial Services Chapter).

18. Thus, if the Tribunal agrees that SDMI itself was a cross-border service provider, it follows that it has no right of action against Canada for the measures that adversely affected its ability to provide such services to customers situated in Canada. Its only international law recourse would have been to request the United States authorities to commence a State-to-State dispute settlement proceeding under Chapter Twenty.

19. It is obvious that had SDMI acted purely as a cross-border service provider, it would have no standing to even make a claim; the question, therefore, is whether its small investment in Myers Canada transforms its ability to claim damages by adding its claimed damages in the U.S. to those allegedly claimed to have been suffered by its investment in Canada.

20. At paragraph 12 of its Reply Memorial, the claimant has attempted to take itself out of the scope and coverage of Article 1213. It went so far as to describe the U.S. investor/cross-border service provider as the investment itself:

12. In the context of the present case, S.D. Myers, Inc. operated in Canada as an investment defined by NAFTA Article 1139. To the extent that S.D. Myers, Inc. operated in Canada as an investment, it could not qualify as a cross-border service under the terms of NAFTA Article 1213 contrary to Canada's suggestion⁵. [Emphasis added]

21. In Mexico's respectful submission, this is wrong.

22. In addition to the fact that the activities described do not fall within the definition of "enterprise" in Article 201, the claimant's submission would require the Tribunal to accept that the investor and the investment can be the same person or entity. It need only look to the definition of "investment of an investor of another Party" to see that NAFTA requires tribunals to examine ownership and control structures between different persons in different national territories.

23. The investor cannot be the investment and the Tribunal has no jurisdiction to award compensation to the investor in its purported capacity as an investment. The Claimant appears first and foremost to have been a cross-border service provider, both when it provided PCB waste

⁵ Investor's Reply memorial (Damages Phase) at paragraph 12.

disposal services at its Ohio services and when it sought to provide such services by carrying on sales and marketing activities in Canada. To the extent that it became an investor, it did so only by making a minimal investment in Canada to advance its service providing objectives.

24. As the Tribunal has already found, SDMI is the investor (of another Party) and Myers Canada is the investment of the investor. The claimant has apparently described SDMI as the 'investment' in an attempt to try to place it outside the limiting language of Article 1213's definition of a cross-border service provider.

25. To accede to this argument, it is respectfully submitted, would substantially expand the scope of Chapter Eleven far beyond the limits set out plainly in the treaty text in excess of jurisdiction.

26. It appears to Mexico that the question before this Tribunal, therefore, is whether the apparently minimal investment that the would-be cross-border service provider made in Canada allows it to somehow roll the U.S. service provider's claimed losses into the Canadian investment to consider them as one, and thereby claim damages alleged to have been suffered by the service provider in the United States (*i.e.*, lost opportunities) as a result of NAFTA-inconsistent measures relating to its investment in Canada.

27. There is an obvious danger that cross-border service providers would characterize minimal marketing expenditures (such as a phone service, a postal address, etc.) in another Party as investments so as to avail themselves of the investor-State arbitral mechanism. This is what led Mexico to point out in its earlier submissions that care must be taken to distinguish between what was being done by the investment and what was being provided through the proposed cross-border supply of services.

28. The Tribunal chose to view this as not relevant to liability but rather to damages, noting instead in its Partial Award that:

299. Consideration of the relationship between Chapters 11 and 12 is more complex. Insofar as the focus is merely on the fact that the two chapters may relate to the same activity, the Tribunal's observations concerning Chapter 3 are apt, but it may be that the question is not whether there is a conflict between Chapters 11 and 12, but whether the cross-border supply of services involves an "investment".

300. 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.

29. In Mexico's respectful submission, the point made in the latter part of paragraph 299 of the Partial Award is of fundamental importance for the following reasons:

30. First, due to NAFTA's structure, a cross-border service provider *per se* has no standing to commence a Chapter Eleven claim. If a cross-border service provider establishes some kind of a presence in another Party, the question arises whether that presence is an investment. It can only

be an investment if it falls within one of the definitions set out in Article 1139. If it does, the cross-border service provider is also an investor.

31. In Mexico's submission, where an investment is claimed to exist by virtue of advances of expenditures, a tribunal must find that there have been the kinds of expenditures that are described in the Article 1139 definition of investment (*i.e.*, (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;) in order to find that the U.S. party has made an investment in Canada within the meaning of Chapter Eleven.

32. To the extent that SDMI did make such an investment in Canada, it can be compensated for a damages flowing from a breach of a Section A obligation that adversely affected such investment.

33. Second, if there is an investment as defined in Article 1139, the question that then arises is whether all expenditures that the service provider may make to solicit orders from customers situated in another NAFTA Party *ipso facto* constitute part of its investment. For example, if SDMI advanced monies to Myers Canada to enable it to carry on representational activities, it has funded its investment. If, however, sales personnel at SDMI's offices in Ohio solicited orders from Canadian customers from its Ohio office, monies expended to that end would have been spent by SDMI in its capacity as a would-be cross-border service provider. Such expenses could not be attributed to Myers Canada.

34. This illustrates the importance of establishing with care the precise contractual relationship between Myers Canada and SDMI, how the former was to be remunerated by the latter for orders successfully solicited for the PCB destruction service in Ohio, whether Myers Canada would receive any portion of profit generated by Canadian business that was solicited directly from Ohio without Myers Canada's involvement, what payments were actually made by SDMI to Myers Canada for the contracts actually performed during the time that the U.S./Canadian border was open, and so on.

35. In Mexico's view, due to the territorial focus of the investment and service-provider definitions, it is crucial that the Tribunal focus on the damages actually suffered by the investment or investor in Canada, not the damages claimed to have been suffered by the cross-border service provider in the United States. It would be contrary to the structure of the NAFTA, beyond the Tribunal's jurisdiction, and contrary to common sense to permit an apparently very small investment in Canada to be used as a means of "shoe-horning" in damages-claimed to have been suffered by the U.S. investor/cross-border service supplier in the United States.

36. Mexico respectfully submits that the only loss or damage the investor may claim under Section B of Chapter Eleven is that which it has incurred *qua* investor⁶ or that which its

⁶ Pursuant to Article 1116.

investment has incurred *qua* investment⁷ by reason of, or arising out of, Canada's breach of Articles 1102 and 1105 as found by the Tribunal in the Liability Phase.

37. In either case, the Tribunal cannot award compensation for loss or damage incurred in respect of the investor's intended economic activity in the United States, *i.e.*, the provision of PCB waste disposal services at its facility in Ohio. The protected interest established by Article 1139 is only such commitment of capital or other resources in the territory of Canada by the investor. Accordingly, it will be important for the Tribunal to properly establish both the amount and purpose of the investor's expenditure in Canada, as well as the nature and purpose of the investment's business activities in Canada that suffered direct harm as a result of Canada's breach of Section A.

38. Mexico submits further that the investment's only compensable loss under Chapter Eleven would be the recovery of an appropriate return on expenditure, or recovery of expenditure, made in connection with its efforts to broker the sale of SDMI's U.S.-based PCB waste disposal services that it could not recover as a result of Canada's breach of Section A (as found by the Tribunal) or, alternatively, the investment's loss of profit caused by the breach⁸.

39. In the case of compensation based on expenditure, it will be important for the Tribunal to determine what (if any) expenditure was impaired as a result of Canada's breach. In the circumstances of this case, such expenditure should consist only of expenses incurred in connection with offering or brokering PCB waste disposal services to be rendered by the investor in the United States, as Canada's temporary ban on exports of PCB waste did not impair the value or utility of any expenditure by the investment in connection with the provision of PCB waste disposal services in Canada.

40. In the case of loss of profits, it will be important for the Tribunal to determine the amount of foregone profit (if any) that properly would have accrued to the Canadian investment rather than the U.S. investor. It would be wrong to lump together the investment's loss of profit that would have been earned by rendering sales and administrative services in Canada with the investor's loss of profit that would have been earned by providing PCB waste disposal services in the United States. This would compensate the investor for loss or damage that does not arise out of a breach of Section A of Chapter Eleven, but by reason (if at all) of a breach of Chapter Twelve, a chapter which falls outside the Tribunal's jurisdiction.

B. The Distinction Between Article 1116 and Article 1117

41. Mexico disagrees with the Claimant's contention that Article 1116 entitles it to claim loss of profits that it would have earned by providing PCB waste disposal services in the United States. The Claimant has misconstrued Article 1116 in making this argument.

⁷ Pursuant to Article 1117.

⁸ Mexico concurs with Canada's view, which is consistent with the position at international law, that loss of profits should not be awarded in the absence of a sufficient track record that would enable the Tribunal to assess the loss with reasonable certainty.

42. Article 1116 provides that “an investor of a Party may submit to arbitration ... a claim that another Party has breached an obligation under Section A ... and that the investor has incurred loss or damage by reason of, or arising out of, that breach”. To use a simple example, Article 1116 would provide the investor standing to submit a claim for the expropriation of real property in the territory of another Party owned by the investor for a business purpose.

43. Article 1117 provides that “an investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the enterprise owns or controls, may submit to arbitration ... a claim that the other Party has breached an obligation under Section A ... and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach”. To use a simple example, Article 1117 would provide the investor with standing to claim on behalf of a subsidiary incorporated in the territory of another Party compensation for denial of national treatment to the subsidiary.

44. Article 1117 enables an investor to submit a claim on behalf of an enterprise that it owns or controls. That enterprise, as a juridical person of another Party (and thus a national of that Party for the purposes of the NAFTA), could not submit to arbitration in its own right.

45. Both Articles must be read in context with the rest of Chapter Eleven, including its definitions in Article 1139. In the result, an investor claiming in its own right under Article 1116 may only claim compensation for loss or damage suffered *qua* investor in the territory of the host Party, not for loss or damage suffered in its capacity as a cross-border service provider or in its capacity as a trader in goods. An investor claiming on behalf of an enterprise under Article 1117 may only claim compensation for loss or damage suffered by the enterprise, not for loss or damage suffered by the investor itself in some other capacity.

C. The Definition of Investment

46. Mexico disagrees with the Claimant’s suggestion that the definition of “investment” in Article 1139 is not exhaustive⁹. Mexico submits that the definition, although broad, is exhaustive. This has been recognized by the three NAFTA Parties who have agreed that Article 1139 provided an exhaustive definition of investment¹⁰. Similarly, ICSID Deputy Secretary General Mr. Antonio R. Parra, recognized the above, stating that “the NAFTA’s definition provides an exhaustive enumeration, rather than an open-ended, illustrative list”¹¹.

47. The definition of “investment” in Article 1139 (“investment means ...”) stands in contrast to the definition of “measure” in Article 102 (“measure includes ...”); the latter is

⁹ Investor’s Reply Memorial (Damages-Phase) at paragraph 3.

¹⁰ In *Methanex Corporation v. United States of America*, the three NAFTA Parties expressly recognized that the definition of “investment” is exhaustive, not illustrative; Canada’s 1128 Submission in *Methanex v. USA* dated 30 April 2001 at paragraph 59; Mexico’s 1128 Submission in *Methanex v. USA* dated 15 May 2001. This same position was also adopted by Canada, in its second submission pursuant NAFTA Article 1128 dated 28 June 2001, in *Marvin Roy Feldman v. The United Mexican States*.

¹¹ Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instrument on Investment*, (1997), 12 No. 2 ICID Rev. 287, pp. 355-356.

clearly illustrative not exhaustive¹². Article 1139 describes eight categories of property rights and economic interests that can be considered to be an "investment" for the purposes of Chapter Eleven. A property right or other economic interest must fall within one of these defined categories for Chapter Eleven to have any application at all.

D. Concluding Comment

48. Mexico observes that both disputing parties briefly adverted to the interaction between Chapter Eleven and the local remedies rule. Canada raised this in the context of mitigation and the claimant responded to this by stating categorically that the doctrine has no place in Chapter Eleven. At paragraph 156 of its Reply Memorial, the claimant stated:

156. There is no requirement under the NAFTA that an investor exhaust local remedies before bringing a Claim. All that is required is that a claimant meet the requirements of NAFTA Articles 1116 and 1120.

49. In fact, this issue is being hotly disputed in two other NAFTA claims where both Mexico and the United States have advanced detailed submissions on instances where the local remedies rule, in their view, has continued force in certain circumstances under NAFTA Article 1121. (Mexico is doing so in the *Feldman* case where domestic judicial proceedings form part of the factual context for the NAFTA dispute and the United States is raising the local remedies rule in the *Loewen* case.) In the *ELSI* case, the International Court of Justice found that it is not to be lightly presumed that the local remedies rule has been done away with in an investment treaty. It stated:

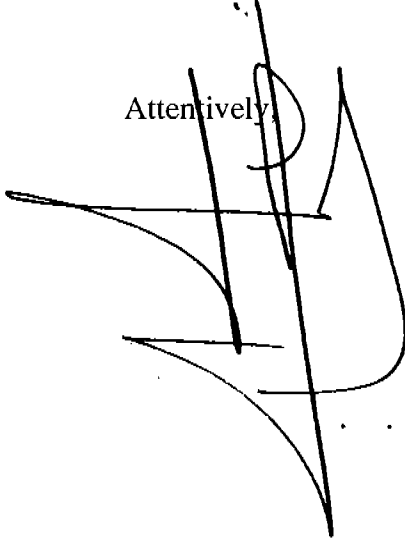
50. The United States questioned whether the rule of the exhaustion of local remedies could apply at all to a case brought under Article XXVI of the FCN [Friendship, Commerce and Navigation] Treaty. That Article, it was pointed out, is categorical in its terms, and unqualified by any reference to the local remedies rule; and it seemed right, therefore, to conclude that the parties to the FCN Treaty, had they intended the jurisdiction conferred upon the Court to be qualified by the local remedies rule in cases of diplomatic protection, would have used express words to that effect; as was done in an Economic Co-operation Agreement between Italy and the United States of America also concluded in 1948. The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based upon alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so. This part of the United States response to the Italian objection must therefore be rejected¹³. [Emphasis added]

¹² These same formulations are used everywhere else in the NAFTA where the Parties intended to provide for exhaustive and illustrative lists. See for example NAFTA Articles 1109(1), 1302(7), 1505(2), 1708(4), 1721 (Public) for the term "include" and NAFTA Articles 318 (Consumed), 1213(2), 1405(4), 1721 (national of another Party); Annex 201.1 (Territory) for the term "means", among others.

¹³ *Case Concerning Elettronica Sicula, S.p.A. (United States of America v. Italy)* [1989] I.C.J. Reports p. 4 at paragraph 50.

50. It is respectfully submitted that neither of the disputing parties has briefed this issue to the extent necessary for this Tribunal to pass upon it and that in any event it is not central to the damages issues before the Tribunal. Accordingly, Mexico respectfully requests the Tribunal not to accede to the claimant's request that it "explicitly reject [Canada's] ... proposition¹⁴" As the concerns of the other two NAFTA Parties demonstrate, the issue is very much alive, it is complicated and subtle, and it would be inappropriate for this Tribunal to pass upon the matter when it is clearly peripheral to the main issues before it and the disputing parties have not fully briefed it.

Attentively,



c.c. Mr. Joseph de Pencier.
Mr. Barry Appleton.
Mr. Alan Birnbaum.

¹⁴ Investor's Reply Memorial (Damages Phase) at paragraph 155.