IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE RULES GOVERNING THE ADDITIONAL FACILITY
FOR THE ADMINISTRATION OF PROCEEDINGS BY THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN

BAYVIEW IRRIGATION DISTRICT, *et al.*,

Claimants/Investors,

-and-

THE UNITED MEXICAN STATES,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), the United States of America makes this submission on a question of interpretation of the NAFTA. No inference should be drawn from the absence of comment on any issue not addressed here. The United States takes no position on how the interpretive position it offers below should be applied to the facts of this case.

2. At the hearing held on November 14-15, 2006, the Tribunal asked the disputing parties to address the following question: whether "Articles 1102 and 1105 of the NAFTA, in contrast to NAFTA Article 1110, apply to all measures taken by Mexico relating either to investors of another party or their investments, whether those investments are in Mexican territory or not . . . ."[1] By letter dated November 16, 2006, the Tribunal invited the non-disputing NAFTA Parties to provide a written submission on this "question of the concept of territoriality in relation to Articles 1102 and 1105 of NAFTA."

3. As described below, all of the protections afforded by the NAFTA's investment chapter extend only to investments that are made by an investor of a NAFTA Party in the territory of another NAFTA Party, or to investors of a NAFTA Party that seek to make, are making, or have made an investment in the territory of another NAFTA Party.

[1] *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB (AF)/05/01, Transcript of Hearing on Jurisdiction, Day 2 at 254:10-22 (Nov. 15, 2006).

4. NAFTA Article 1101 defines the "Scope and Coverage" of Chapter Eleven. All other Articles in Chapter Eleven must be interpreted within the confines of that scope and coverage.[2] Article 1101(1) provides:

> This Chapter applies to measures adopted or maintained by a Party relating to:
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> (a) investors of another Party;
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> (b) investments of investors of another Party in the territory of the Party; and
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> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

5. NAFTA Article 1105(1) provides:

> 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.

Article 1105(1) thus requires that a minimum level of treatment be accorded to "*investments* of investors of another Party." As Article 1101(1)(b) expressly states, the only measures relating to investments that are within the scope of NAFTA Chapter Eleven are those relating to "investments of investors of another Party *in the territory of the Party*" that has adopted or maintained those measures.[3] The obligation of Article 1105(1), therefore, applies only to treatment resulting from measures relating to investments of investors of one Party that are *in the territory* of the Party that has adopted or maintained the measures at issue. It does not apply to treatment of investments located outside of the territory of that Party.

6. NAFTA Article 1102, the national treatment obligation, provides in pertinent part:

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

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[2] *See Methanex Corp. v. United States of America*, (First Partial Award) 2002 WL 32824210 at ¶ 106 (Aug. 7, 2002) ("[Article 1101(1)] is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met.").

[3] NAFTA art. 1101(1)(b) (emphasis added).

Article 1102 thus requires that national treatment be accorded both to "investors of another Party" and to "investments of investors of another Party," with respect to, in both instances, the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

7. As is the case with the obligation of Article 1105(1), the Article 1102(2) obligation that national treatment be accorded to "*investments* of investors of another Party," applies, under the express terms of Article 1101(1)(b), only to treatment resulting from measures relating to *investments* that are *in the territory* of the Party that has adopted or maintained the measures at issue. It does not apply to treatment of investments located outside of the territory of that Party.

8. Likewise, the Article 1102(1) obligation that a NAFTA Party accord national treatment to investors of another NAFTA Party with respect to those investors' investments (*i.e.*, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition thereof) applies only to treatment accorded to such investors with respect to their investments in the territory of that Party. Even though, in addressing the scope of Chapter Eleven with respect to measures relating to *investors* of another Party, Article 1101(1)(a) does not expressly limit that scope to measures relating to investors with respect to investments in the territory of the State, it is clear that it is so limited.[4] Indeed, any other conclusion would be absurd.

9. The phrase "investor of a Party" is defined in Article 1139 in relevant part as "a national or enterprise of such Party, that seeks to make, is making or has made an investment." Read in context and in light of the object and purpose of the NAFTA with respect to investment, the phrase "investors of another Party" used in Article 1101(1)(a) means a national or enterprise of such Party that seeks to make, is making or has made an investment in the territory of the Party that is subject to the obligations of Chapter Eleven.

10. Were this not the case, the scope of Articles 1102(1) and 1102(2) would differ dramatically, leading to absurd results. The United States, for instance, would be obligated under Article 1102(1) to accord national treatment to a Canadian national that made an investment in Canada even though it would have no obligation to accord national treatment to that Canadian investment itself. Such an interpretation of the national treatment obligation in the NAFTA would make no sense and would be contrary to the Treaty's object and purpose.

11. The aim of international investment agreements is the protection of *foreign* investments, and the investors who make them. This is as true with respect to the investment provisions of free trade agreements (FTAs) as it is for agreements devoted exclusively to investment protection, such as bilateral investment treaties (BITs). NAFTA Chapter Eleven is no different in this regard. One of the objectives of the NAFTA, expressly set forth in Article 102(1)(c) is to "increase substantially investment

[4] For the reasons outlined below, the obligation contained in Article 1102(2) would have to be interpreted to apply only to treatment accorded to investments of investors in the territory of another NAFTA Party even if Article 1101(1)(b) did not expressly contain any territorial restriction.

opportunities in the territories of the Parties" which refers to, and can only sensibly be considered as referring to, opportunities for *foreign* investment in the territory of each Party made by investors of another Party.[5] That objective is not advanced by extending the investment chapter's protections to investors of one Party that are not seeking to make, are not making and have not made investments in the territory of another Party.[6]

12. To conclude that NAFTA Chapter Eleven extends substantive protections and the right to arbitrate to investors of a NAFTA Party that are not seeking to make or have not made investments in the territory of the NAFTA Party whose measure is at issue would constitute a radical expansion of the rights that each of the NAFTA Parties has granted to foreign investors under their BITs and under all other international agreements into which they have entered. Any such interpretation would render every person or enterprise in a NAFTA Party that believes that its business, wherever located, has been adversely affected by a measure of another NAFTA Party an investor entitled to Chapter Eleven's protections. Such a result would also circumvent the mechanism provided in NAFTA Chapter Twenty for the resolution of purely trade-related disputes through State-to-State dispute settlement procedures.

13. The context of Article 1101(1)(a) also makes clear that the investors referred to are investors that are seeking to make, are making or have made investments in the territory of another Party. United States' negotiators based the negotiations for the NAFTA's investment chapter on the predecessor Canada-U.S. Free Trade Agreement,[7] the scope of which was limited to "any measure of a Party affecting investment within or into its territory by an investor of the other Party,"[8] and the model U.S. BIT, which also contained language in its "chapeau" concerning "investment by nationals and companies of one Party in the territory of the other Party" and defined "investment" as "every kind of investment, in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party . . . ."[9]

14. In addition, the United States Statement of Administrative Action ("SAA") – an instrument submitted to Congress in connection with the conclusion of the NAFTA that explains the Treaty's content and which has been accepted by the other Parties as an

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[5] *See Metalclad Corp. v. United Mexican States*, ICSID Award, Case No. ARB(AF)/97/1, ¶ 75 (2000) (interpreting NAFTA Article 102(1) as evidencing the goal of the NAFTA Parties "to promote and increase *cross-border* investment opportunities") (emphasis added).

[6] *Gruslin v. Malaysia*, ICSID Award, Case No. ARB/94/1, ¶ 13.8 (2000) (finding that the meaning of the terms of the agreement was informed by the "stated objectives" of the agreement, which included creating favorable conditions for investments by nationals of one Party in the territory of the other Party).

[7] UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO THE CONGRESS, NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES Vol. 2, 19 (Sept. 1993).

[8] Free Trade Agreement, U.S.-Canada, art. 1601(1), *entered into force* Jan. 1, 1989, 27 I.L.M. 281, 373 (1988).

[9] UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO THE CONGRESS, NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES Vol. 2, 19 (Sept. 1993); *see* The September 1987 Draft Model U.S. BIT, *reprinted in*, KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE Appendix A – 4 (1992); The February 1992 Draft Model U.S. BIT, *reprinted in*, RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 240-53 (1995).

instrument related to the NAFTA – provides that Chapter Eleven "applies where such firms or nationals make or seek to make investments *in another NAFTA country*."[10] The SAA further specifies that "Part A [of Chapter Eleven] sets out each government's obligations with respect to investors from other NAFTA countries and their *investments in its territory*."[11] Likewise, Canada's Statement on Implementation of the NAFTA, also concluded contemporaneously with the NAFTA, provides that Chapter Eleven was intended to build upon Canada's experience with "investment agreements both to protect the interests of Canadian investors abroad and to provide a rules-based approach to the resolution of disputes involving foreign investors in Canada or Canadian investors abroad."[12] In the *S.D. Myers* arbitration, Canada reiterated its understanding that Chapter Eleven applies only to investors that have, or are seeking to make, investments in the territory of the disputing Party.[13] All three NAFTA Parties thus agree that the scope and coverage of NAFTA Chapter Eleven is restricted to investors of a NAFTA Party that are seeking to make, are making or have made investments in the territory of another NAFTA Party.[14]

Respectfully submitted,

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[10] North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., 589 (1993) (emphasis added).

[11] *Id.* (emphasis added).

[12] Department of External Affairs, North American Free Trade Agreement: Canadian Statement on Implementation, Extract, Canada Gazette, Part I, 147 (January 1, 1994).

[13] *See S.D. Myers, Inc. v. Canada*, Government of Canada Counter Memorial, ¶¶ 218-52 (Oct. 5, 1999) (arguing that because the claimant did not have an investment in Canada the claim was not within the scope of Chapter Eleven); *id.* at ¶ 259 ("The [Article 1102(1)] obligation does not mean that the national treatment obligation applies to the investor's activities in its home country. The obligation only applies to the investor with respect to its investment in the foreign country . . . .").

[14] *See also Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, United Mexican States Memorial on Jurisdiction ¶ 2(a) (Apr. 19, 2006); *see generally, Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Transcript of Hearing on Jurisdiction, Day 1 at 21:12-22:18; 24:10-21; 27:2-28:16; Day 2 at 255:12-264:14 (Nov. 14-15, 2006).