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RE: Methanex Corporation v. The United States of America

The Government of Mexico makes this submission pursuant to Article 1128 of the NAFTA, in relation to the petitions of the International Institute for Sustainable Development, Communities for a Better Environment, The Bluewater Network of Earth Island Institute, and the Center for International Environmental Law (the Petitioners) to file *amicus curiæ* briefs in the above referenced proceeding.

A. The parties in a NAFTA Chapter Eleven dispute settlement proceeding

1. The NAFTA establishes a mechanism that allows an investor of a Party and another Party to resolve investment disputes involving claims to money damages arising from the alleged breach by such other Party of certain obligations set forth in Chapters Eleven and Fifteen. By its express terms, Chapter Eleven only allows an investor of a Party[1] to submit a claim to arbitration under Section B, and such claims can only be directed against one NAFTA Party, i.e. the host State of the investment of the disputing investor. Thus, Article 1139 defines disputing parties as the disputing investor and the disputing Party[2].

1. Article 1139 defines investor of a Party as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment".

2. Under Article 1139, "disputing investor means an investor that makes a claim under Section B" and "disputing Party means a Party against which a claim is made under Section B".

2. Except as provided under Article 1128, no other person has a legal interest in the dispute, and therefore, Chapter Eleven does not provide for the intervention of other persons.

3. Indeed, even an enterprise of a Party that is a juridical person owned or controlled, directly or indirectly, by an investor of another Party —and that by definition is an entity that has a separate and distinct legal personality from that of the investor— may not submit a claim to arbitration on its own against the Party under whose law it is established or organized, and it is also not afforded a right of intervention, even though it would have a direct legal interest in the dispute. This is also the case for enterprises of a Party on whose behalf no investor of another Party could submit a claim to arbitration (although the investors could bring a claim on their own pursuant to Article 1116).

B. Participation by a NAFTA Party

4. Because the NAFTA Parties have a fundamental interest in the proper interpretation of the Agreement, they agreed to allow for NAFTA Parties other than the disputing Party to make submissions. However, Article 1128 confers only a limited right upon the other NAFTA Parties to make submissions to a Tribunal on questions of interpretation of the NAFTA.

5. Moreover, under Articles 1127 and 1129, the NAFTA Parties are entitled to obtain all the documents and other information exchanged in the course of a proceeding under Section B of Chapter 11 of the Agreement, including the evidence tendered to the Tribunal, but that right is not extended to other persons.

6. NAFTA Parties have availed themselves of the opportunity to make submissions in writing to tribunals hearing claims against another Party. However, non-disputing Parties have not taken an active role in such proceedings beyond the filing of the submission and attendance at the hearing to observe it.

7. If *amicus curiaæ* submissions were allowed, *amici* would have greater rights than the NAFTA Parties themselves, because of the limited scope of Article 1128 submissions. Given that nowhere in Chapter Eleven are non-NAFTA third parties even contemplated, such a result was clearly never intended by the NAFTA Parties. Alternatively, allowing *amicus curiaæ* submissions would render Article 1128 meaningless, contrary to the principle of effectiveness in international treaty interpretation, because the NAFTA Parties would then be able to make submissions on questions on interpretation of the Agreement under Article 1128, and file *amicus* briefs for other purposes. In either case the result would be inconsistent with the clear terms of the chapter.

C. Tribunals Have Limited Authority to Seek Other Evidence or Information

8. A Chapter Eleven tribunal's interest in resorting to the use of an expert on environmental or other scientific matters under Article 1133 is dependent upon the assent of the disputing parties. Article 1133 only allows Tribunals to seek for information from experts with consent of the disputing parties:

> a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

9. Thus, even the Tribunal's authority to act on its own initiative is limited to the appointment of experts and receiving their opinions and, in any event, is subject to the disputing parities not disapproving.

D. Other Considerations

10. The Petitioners submit that an analogy may be drawn with the provisions relating to receipt of information from experts. However, this proposition is incorrect for the following reasons:

- First, *amici curiæ* would not be participating in a capacity of independent experts. To the contrary, by definition *amici* and other type of intervenors participate in order to advance specific interests, rather that to render an independent opinion.

- Second, under Article 1133 expert reports are limited to certain factual issues or other scientific matters raised in a proceeding by a disputing party or the tribunal itself. They are not the vehicle for advancing specific interests of particular persons or interest groups, or to set out legal submissions.

11. It has been asserted by one of the petitioners that "[t]he power of a court to receive *amicus* briefs is well recognized in domestic law". While this is so for Canada and the United States, it is not the case under Mexican law.

12. Under Mexican law, only a person with a legal interest in the dispute —i.e. whose substantive rights may be affected as a result of litigation between the disputing parties— may

make third party submissions. The concept of an *amicus ciruiæ* is not incorporated into Mexican law.

13. NAFTA Chapter Eleven establishes a dispute settlement mechanism that introduces a careful balance between the procedures of common law countries and those of civil law countries (such as Mexico). The fact that a specific procedure or legal concept may exist in a Party's domestic law cannot serve as grounds to transport it into the international plane.

14. Even though in this arbitration both the disputing Party and the Party of the disputing investor are common law countries, Mexico is concerned that concepts or procedures that are alien to its legal tradition and which were not agreed to as part of the NAFTA may be imported into NAFTA dispute settlement proceedings, and set a precedent for future cases in which Mexico is involved as the disputing Party.

E. Conclusions

For the above reasons, the Government of Mexico respectfully submits that Chapter Eleven does not allow the submission of *amicus curiæ* briefs or the intervention in the proceeding of third persons, except for the limited right of the other NAFTA Parties to file submissions on questions of interpretation of the Agreement under Article 1128.

If the NAFTA Parties had intended to incorporate such a right, they would have done so expressly, just as they did in the case of Article 1128 submissions. The express limitation of the rights of the NAFTA Parties —who have a direct legal interest in all disputes— and enterprises of a Party with a participation of investors another Party —who would have a direct or indirect legal interest in certain disputes— leads to the conclusion that other type of interventions are not allowed, and not merely procedural gaps.

The Petitioners' request should, therefore, be rejected.

All of which is respectfully submitted

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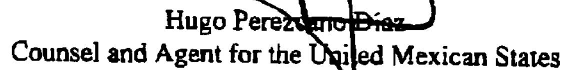
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