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Re: Methanex Corporation v. United States of America

Gentlemen:

Pursuant to the terms of the Tribunal's letter of October 26, 2001, Claimant Methanex Corporation respectfully submits this Reply to the Response of Respondent United States of America of October 26, 2001 to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation ("U.S. Resp."). In support of this Reply, Methanex also submits the enclosed Declaration of Guillermo Aguilar Alvarez ("Aguilar Decl.").

REPLY SUBMISSION

Methanex agrees with the United States that under Article 1131(2) of NAFTA, the Free Trade Commission ("FTC") may issue binding *interpretations* of the provisions of NAFTA Chapter Eleven. Indeed, it is common ground between the parties that the power of the FTC is limited to "interpretation" of NAFTA Chapter Eleven, and that the FTC has no power to amend any of the articles of NAFTA Chapter Eleven. (*See* U.S. Resp. at 3-5.)

Unfortunately, the parties' agreement on this point does not end the matter. The FTC statement is so ambiguous that it is subject to conflicting understandings – as the conflicting legal positions of Methanex and the United States demonstrate – and the Tribunal is thus left with the question of which one of these conflicting understandings should be adopted as the correct one.

As is shown by the attached declaration of Mr. Guillermo Aguilar Alvarez, Mexico's negotiator for Chapter Eleven, only Methanex's position is true to the intent of NAFTA's drafters, which was to provide foreign investment with the protections of fairness, equity, and full security, as well as the protections of other treaties to which NAFTA States are parties. (*See* Aguilar Decl., ¶¶ 14-21.) The United States has not proffered *any* contrary negotiating history, and it adamantly refuses to produce *any* documents concerning this negotiating history.

Further, only Methanex's proffered understanding of the FTC statement is true to the limited interpretive power of the FTC. By contrast, the United States' submission would result in drastic and impermissible changes to the text of Article 1105 – amendments which the FTC, exercising its interpretive function, may not effect. Thus, the FTC's "interpretation" of July 31, 2001 is binding on this Tribunal *only* if, and *only* to the extent that, it is an interpretation and not an amendment.[1]

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[1] The United States asserts that this Tribunal can neither interpret nor review "determinations" by the FTC (U.S. Resp. at 4), but it cites no authority for this assertion. It simply cannot be correct that this Tribunal must accept *any* pronounced "interpretation" by the FTC, regardless of its content or effect, simply because the FTC labels its action as "interpretation." For example, if the FTC "interpreted" Article 1105 to protect investments *only* from treatment that would

I. The Ambiguous FTC "Interpretation" Must Be Understood Consistent with the FTC's Limited Interpretive Power Under NAFTA Article 1131, and Not in Such a Way as To Render It an Impermissible Amendment

Notwithstanding the gloss that the United States' litigating position seeks to place upon it, the FTC's "interpretation" is, as Methanex has previously noted, hardly a model of clarity. (*See* Claimant Methanex Corporation's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation ("Methanex Subm."), at 2, 7, 17.) Each of the "interpretive" propositions set forth in the FTC's July 31, 2001 statement is itself subject to conflicting interpretations. Indeed, the FTC statement was drafted in a sufficiently oblique fashion that, as noted, allows lawyers from both sides of this case to argue that its language supports their submissions.

As Methanex's submission of September 18 indicated (*see id.* at 3-6), the Tribunal should, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (May 23, 1969), resolve this dispute with reference to the ordinary meaning of the text of Article 1105, as well as other long-standing principles of treaty interpretation. This Reply demonstrates that if the United States' litigating position were adopted by the Tribunal, the FTC's statement would be entirely inconsistent with any proper interpretation of NAFTA's text and would therefore constitute an impermissible amendment. By contrast, if Methanex's understanding of the FTC statement (as put forth in its submission) is adopted by the Tribunal, then the FTC's statement would be consistent with international rules of treaty interpretation, and therefore would be within the FTC's interpretive powers under Article 1131 of NAFTA. That

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constitute a classic, physical expropriation under customary international law – which, incidentally, seems to be the United States' desired outcome in this case (*see* Claimant Methanex Corporation's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation ("Methanex Subm."), at 15) – that would clearly not be an "interpretation" of the Article, but an improper, *ultra vires* attempt to amend the article to restrict investment protections. Certainly this Tribunal would not be required to blindly apply such an "interpretation."

counsels rejection of the United States' litigating position, and adoption of Methanex's understanding of the FTC statement.

A. The United States' Submission Would Cause The FTC Statement To Amend Article 1105 By Erasing Entirely The Textual Guarantees of "Fair and Equitable Treatment" and "Full Protection and Security"

The United States' litigating position concerning the FTC statement would render it an impermissible amendment for several reasons, the first of which relates to the phrases "fair and equitable treatment" and "full protection and security." (*See* Methanex Subm. at 3-6.) As noted above, the Vienna Convention requires that the terms of a treaty be given their ordinary meaning in light of their context and the object and purpose of the treaty. *See* Art. 31(1). Another NAFTA Tribunal has held that Chapter Eleven should be given a "liberal . . . interpretation" in order to effect the treaty's stated purposes of protecting investments. *Loewen v. United States* (Juris. Award, Jan. 5, 2001), ICSID Case No. ARB(AF)/98/3, ¶ 53 (discussing the term "measures").

Yet under the United States' understanding of the FTC's July 31, 2001 action, Article 1105's explicit guarantees of "fair and equitable treatment" and "full protection and security" would not only be denied their ordinary meaning, but would effectively be read out of NAFTA, to the detriment of foreign investments. In the United States' submission, these phrases mean nothing more than the phrase preceding them, "in accordance with international law." (*See* U.S. Resp. at 5-7.) These two important investment guarantees thus become entirely superfluous under the United States' submission. Such an interpretation would not only violate the Vienna Convention's ordinary meaning requirement, but would also violate the international law principle of effectiveness, which prohibits "an interpretation . . . which would make a provision meaningless, or ineffective." 1 *Oppenheim's International Law* 1280 (Jennings & Watts, eds., 9th ed. 1996) (footnote omitted).

The United States' understanding of the FTC statement would therefore result in an interpretation of Article 1105 that is utterly inconsistent with long-held principles of treaty interpretation and prior NAFTA decisions. And if it cannot constitute a permissible

"interpretation" of Article 1105, the FTC statement must be viewed as an impermissible amendment. The *only* way to understand the FTC's action as an effective and true interpretation of Article 1105 would be as Methanex submits – to read the FTC statement as confirming the NAFTA Parties' agreement that "fair and equitable treatment" and "full protection and security" are now so widely accepted in the law of international investment that they form part of the package of guarantees included within the rubric of "customary international law." (*See* Methanex Subm. at 7-14.) This understanding of the FTC statement is not only consistent with both its text, and the text of Article 1105, but also with the current, evolved state of customary international law. (*See id.* at 7-11; *see also* Methanex Juris. Tr. at 404-07 (Mr. Dugan asserting that "even if the U.S. interpretation is accepted . . . the text of the treaty itself expresses the formal agreement of the parties that customary international law *includes* the fair and equitable treatment standard. . . . The treaty system around the world that incorporates this standard is so extensive that it has all the attributes of customary international law. States now expect their investments to be treated fairly and equitably by foreign countries, and they expect this as a matter of obligation of foreign countries, and as such, it is customary international law.").)

Indeed, the United States does not dispute that through the extensive network of bilateral investment treaties ("BITs"), state practice has almost universally adopted the standard of "fair and equitable treatment." (*See* U.S. Resp. at 5-6.) Nor does the United States dispute that "fair and equitable" is a common and well-understood legal concept (particularly in the United States (*see* Methanex Subm. at 4-5)) that is regularly applied by courts and tribunals, or that the Vienna Convention requires treaty terms to be interpreted in accordance with their ordinary meaning. Despite this, however, the United States argues that "the mere fact that the words 'fair and equitable treatment' appeared in a large number of bilateral investment treaties d[oes] not establish widespread state practice as to the *content* of that standard," which according to the United States is not its ordinary meaning (*i.e.*, a requirement for fairness and equity deemed too

"subjective" by the United States (*see* U.S. Resp. at 4)), but rather "the customary international law minimum standard of treatment of aliens." (*Id.* at 6.)[2]

This argument is contrary not only to the principles of international law discussed above, but also to materials posted on the U.S. Department of State's own website, which make clear that one of the "basic aims" of the U.S. BIT program is to provide fair treatment and protection for investments:

> The U.S. Bilateral Investment Treaty (BIT) program supports several key U.S. Government economic policy objectives . . . .
>
> The BIT program's *basic aims* are to:
>
> ***Protect*** U.S. investment abroad in those countries where U.S. investors' rights are not protected through existing agreements such as our treaties of Friendship, Commerce and Navigation;
>
> **Encourage** adoption in foreign countries of market-oriented domestic policies that treat private investment *fairly*; and
>
> **Support** the development of international law standards consistent with these objectives.

U.S. Bilateral Investment Treaty Program, Fact Sheet, Released by the Office of Investment Affairs (IFD/OIA), Bureau of Economic and Business Affairs (Nov. 1, 2000), *found at* http://www.state.gov/www/issues/economic/7treaty.html (last visited Nov. 7, 2001) (bold emphasis in original; italicized emphasis added).

In fact, according to Mr. Guillermo Aguilar Alvarez, one of Mexico's chief negotiators of NAFTA Chapter Eleven, the United States "insisted" during those negotiations "on reference in the NAFTA to concepts it clearly asserted were *part of* customary international law (*e.g.* 'fair

[2] The United States' position in this respect is at best ironic. In the first place, the FTC statement does nothing to better define the "content" of Article 1105, but simply injects a debated, and textually uninformative, legal concept – "the customary international law minimum standard of treatment of aliens" – into the mix. Second, as leading commentators have noted, the textual guarantee of "fair and equitable treatment" provides "a much more objective standard than any previously employed form of words," including the phrase "minimum standard." *See, e.g.*, F.A. Mann, *Further Studies in International Law* 238 (1990).

and equitable treatment' and 'full protection and security' in article 1105(1) . . .)." (Aguilar Decl., ¶ 14 (emphasis added); *see also id.*, ¶ 20 ("The United States insisted that 'full protection and security' and 'fair and equitable treatment' as they are used in the investment protection field were *already part of* customary international law." (emphasis added)).) In other words, the United States *did not* assert during the negotiations of Article 1105 that "fair and equitable treatment" and "full protection and security" were *synonymous* with the minimum standard of treatment of aliens, but rather that they were "part of" (i.e., not "equal to," but a component of) customary international law. Indeed, this prior negotiating position of the United States is consistent with both the text of the FTC statement and the text of Article 1105(1), which requires "treatment in accordance with international law, *including* fair and equitable treatment and full protection and security," *not* "treatment in accordance with the customary international law minimum standard of treatment of aliens" – a phrase which has long existed in international law and which could surely have been used by the Parties if that had been their intent.[3]

The customary international law created by the BITs, and the explicit text of NAFTA Article 1105, both require that investments receive fair and equitable treatment and full

[3] Moreover, a U.S. congressional committee has implicitly *rejected* the U.S. litigating position concerning the FTC statement and NAFTA Article 1105. The Committee on Ways and Means of the United States House of Representatives – which has primary jurisdiction over international trade legislation – recently voted down a proposed piece of legislation that sought to narrow the investment protections that are now being negotiated in the Free Trade Agreement of the Americas ("FTAA"). The proposed legislation sought to "[c]odify [in the FTAA] the recent clarifications made by the NAFTA governments to the 'minimum standard of treatment' investment rules, which were made to correct erroneous decisions by NAFTA arbitration panels." H.R. Rep. No. 107-249, pt. 1, at 71 (2001). Additionally, under proposed legislation the "minimum standard of treatment" would be violated only by a violation of "a customary international law standard defined as denial of justice *and* failure to provide *full protection and security*." *Id.* at 79 (emphasis added). The House Committee on Ways and Means rejected this proposed legislation, *see id.* at 2-3, implicitly rejecting both the FTC Statement itself and the proposed restrictive definition of the "minimum standard." Yet it is interesting to note that even the members of Congress that *favor* the FTC statement agree with Methanex that at least "full protection and security" is required as part of both "customary international law" and the "minimum standard," and is not merely a meaningless reference.

protection and security. The United States' argument that the FTC statement in effect eliminates what it deems "some new standard based on subjective notions of what is 'fair' or 'equitable'" (U.S. Resp. at 4) cannot therefore be correct.

B. The United States' Position that the FTC Interpretation Forbids Consideration of Non-NAFTA Treaty Obligations in All Cases is Also Improper

An entirely separate issue arises out of the United States' assertions that "[t]he FTC interpretation makes clear" that "claims based on violations of other treaty obligations" are "preclude[d]" under Article 1105. (U.S. Resp. at 7.) The United States' submits that because of the FTC statement, "[t]here is no longer any doubt as to the lack of foundation for Methanex's arguments that Article 1105 permits claims based on violations of WTO or other conventional international obligations." (*Id.* at 7-8.) The United States makes these assertions without actually discussing the *text* of the FTC statement, which is because, as Methanex showed in its submission (*see* Methanex Subm. at 14), the FTC statement makes no such blanket prohibition.

The FTC statement simply states 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)." FTC statement, ¶ B(3) (emphasis added). In other words, it states that a violation of, for example, a WTO requirement that affects an investment would not be a *per se* violation of Article 1105. But Methanex has never claimed that a violation of a WTO obligation "establishes" a *per se* violation of Article 1105; to the contrary, it has made explicitly clear that it *does not* advance such an argument. (*See, e.g.*, Methanex Juris. Tr. at 90 (Mr. Dugan stating "I don't think that any violation of GATT or any violation of the WTO is, per se, actionable under Chapter 11.").) Methanex's position -- that a violation of a non-NAFTA Chapter Eleven treaty obligation may constitute evidence of unfair and inequitable treatment where all other NAFTA Chapter Eleven requirements are met (*see, e.g., id.* at 88-90) – is in fact entirely consistent with the FTC interpretation, which in no way suggests that Party conduct violating another provision of NAFTA or another treaty cannot *also* constitute treatment that violates Article 1105. (*See* Second Jennings Op. at 4.) Indeed, the United States' extreme

litigating position – that the FTC statement forbids NAFTA tribunals from considering whether such non-NAFTA obligations have been violated – is directly contrary to the intent of Chapter Eleven's drafters, as shown by the Aguilar Declaration.

The United States does not seriously dispute Methanex's evidence that it was the Parties' original intent to include *both* customary and treaty protections within Article 1105; instead, the United States relies on its interpretation of the FTC statement. (*See* U.S. Resp. at 7.) But as Methanex has already noted (Methanex Subm. at 6), the word "customary" was actually deleted from one of the negotiating texts of NAFTA Article 1105. The United States responds (U.S. Resp. at 3 n.1) by asserting that Methanex "offers no support" for this proposition; however, the Declaration of Mr. Aguilar, Mexico's Chapter Eleven negotiator, now confirms this point as a factual matter. (*See* Aguilar Decl. ¶ 15.) Mr. Aguilar states quite clearly that "at some point during the negotiations, a proposed text for article 1105(1) included the word 'customary'" but that – following Mexico's objection and extensive discussion by the NAFTA Parties – this word "was deliberately left out of the final version of the NAFTA." (*Id.*, ¶ 15; *see also id.*, ¶ 19 ("the meaning of article 1105(1) was the object of extensive negotiations that resulted in rejection of 'customary international law' as the sole standard for the treatment of investments and their investors.").)

The reason for, and legal consequence of, the deletion of the word "customary" cannot be overstated. The clear and intended consequence of this deletion, especially in Mexico's eyes, was to bring within Article 1105 other obligations of "international law," including independent treaty obligations between or among the NAFTA Parties. (*See* Methanex Subm. at 6, 14.) Mr. Aguilar states that during the negotiations of Article 1105:

> The U.S. negotiators indicated that Mexico's proposal to exclude the word 'customary' would in fact broaden, rather than limit, the scope of Article 1105(1) (*e.g.*, by adding treaty law). Mexico was aware of this but trusted that, to the extent that it had more control over the development of non-customary international law through exercise of its power of adherence to international treaties, the scope of article 1105(1) could in fact be narrowed in certain circumstances.

(Aguilar Decl., ¶ 16.) Thus, "the Mexican position, which was eventually adopted in the final treaty version, was that the word 'customary' was unacceptable precisely because Mexico wanted treaty obligations to be part of article 1105's 'international law' protection." (*Id.*, ¶ 21.)

The United States' contrary litigating position with regard to the FTC "interpretation" would therefore amend the scope of Article 1105 from what its negotiators understood it to mean.[4] Mr. Aguilar's declaration makes clear that non-NAFTA treaty protections can – and were *intended* by the Chapter Eleven negotiators to – come within the scope of Article 1105 (*see* Aguilar Decl., ¶¶ 15-17, 21), and any violation of such protections consequently would be convincing evidence of a violation of that NAFTA article.

The United States has not even attempted to respond to Mr. Aguilar's recollections about the negotiating history of NAFTA, which were clearly set forth in Methanex's September 18, 2001 submission. It has not produced a declaration from a U.S. negotiator of NAFTA Chapter Eleven contradicting Mr. Aguilar's position. Moreover, the United States steadfastly refuses to produce any negotiating history, including previous drafts of NAFTA, although it acknowledges that these drafts both exist and are in the searchable (but unilateral) possession of the United States. *See* Letter of 10/11/01 from B. Legum to Tribunal Members, at 2.

As a matter of basic due process and equality of treatment, this Tribunal cannot and should not accept the United States' position without requiring the United States to produce the

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[4] Indeed, the U.S. Department of State's position in this case seems to be contrary to the U.S. Congress' understanding of Article 1105. As noted above, the Committee on Ways and Means of the U.S. House of Representatives recently rejected a version of a bill that sought codification of the FTC statement in the proposed FTAA (now being negotiated). *See supra* note 3. The *rejected* bill also sought to "[e]nsure through rules in the text of the agreement that the investor protections do not interfere with legitimate domestic regulations (*e.g.*, domestic health, safety, and environmental regulations), including by specifically clarifying that the agreement standards do not require use of the 'least trade restrictive' alternative – the specific clarification corrects an erroneous decision by a NAFTA arbitration panel." H.R. Rep. No. 107-249, pt. 1, at 71. The Committee's rejection of this position in its adopted bill, *see id* at 2-3, can only suggest that it does not agree with the Department of State's litigating position that the "least restrictive measure" requirement found in the WTO agreements is outside the scope of Article 1105.

full negotiating history of NAFTA Chapter Eleven. This is particularly so given the uncontradicted assertions of Mr. Aguilar, a Chapter Eleven negotiator.

On the evidence now before it, this Tribunal can only conclude that the U.S. interpretation of the FTC statement is inconsistent with the customary international law of investment, the international principles of treaty interpretation, and the negotiating history of NAFTA, and that the United States is thus seeking an impermissible amendment of Article 1105. Yet the Tribunal need not conclude that the FTC itself acted improperly, or in bad faith, or *ultra vires,* to conclude that the United States' view of the FTC statement must be rejected. In fact, Methanex urges the Tribunal to presume that the FTC acted within its interpretive authority. That will yield the conclusion that the litigating position offered by the United States' cannot be the correct understanding of the FTC's July 31, 2001 statement.

II. Under *Any* Interpretation of Article 1105 and the FTC Statement, Methanex Is Entitled to Fair and Equitable Treatment and Full Protection and Security

Even if this Tribunal were to adopt the United States' position and conclude that Article 1105 is limited to an outdated view of customary international law that predates the international regime of investment protection and therefore does not include the BIT protection guarantees of "fair and equitable treatment" and "full protection and security" for investments, NAFTA would still require California to treat Methanex fairly, equitably, and without discrimination, and to accord it full protection. Methanex demonstrated in its September 18, 2001 submission that customary international law has always incorporated the international concepts of fairness, equity, due process, non-discrimination, and appropriate protection. (*See* Methanex Subm. at 11-14 (citing numerous cases and authorities).)

Moreover, the explicit text of Article 1105 *requires* that investments receive "fair and equitable treatment" and "full protection and security." As Methanex previously noted, the FTC statement itself does not in any way attempt to alter the international law requirement that these phrases be given their ordinary meaning, to change the ordinary meaning of these phrases, or to remove them from the treaty. (*Id.* at 5.) Nonetheless, the United States goes to great lengths to

avoid the critical – yet easily answered – question: Was California required to treat Methanex fairly and equitably?

The clear language of NAFTA, the near-universal adoption of the "fair and equitable" standard by the BITs, the long-established place of fairness and equity principles in customary international law, and now Mr. Aguilar's declaration, can yield only one conclusion: California was required to accord Methanex fairness, equity and full protection. As the United States Supreme Court has said, "[t]here is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation, but perversion . . . ." *United States v. M.H. Pulaski Co.*, 243 U.S. 97, 106 (1917). NAFTA Article 1105 means what it plainly says, and the FTC statement does not – and cannot – change that. But the United States' litigating position is that the FTC statement means that California was allowed to treat Methanex unfairly and inequitably, and that a blatant and intentional breach of a non-NAFTA obligation can *never* be an Article 1105 violation; it in effect seeks an impermissible amendment of Article 1105. This Tribunal must, consistent with equity and due process, reject the U.S. position.

Respectfully submitted,

/s/ Christopher F. Dugan

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/s/ James A. Wilderotter

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