IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

REJOINDER OF RESPONDENT UNITED STATES OF AMERICA TO METHANEX'S REPLY SUBMISSION CONCERNING THE NAFTA FREE TRADE COMMISSION'S JULY 31, 2001 INTERPRETATION

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In accordance with the Tribunal's order of November 28, 2001, the United States respectfully submits this response to Methanex's reply post-hearing submission dated November 9, 2001 (the "Methanex FTC Reply").

The great majority of Methanex's FTC Reply simply repeats arguments previously advanced in its September 18, 2001 submission and fully addressed in the United States' submission of October 26, 2001 ("U.S. FTC Response"). Rather than revisit well-trodden ground, the United States addresses here only the few new points of argument asserted in Methanex's FTC Reply. The United States rests on its previous submissions with respect to issues not addressed herein.

I. THE FTC'S BINDING INTERPRETATION DOES NOT AMEND ARTICLE 1105(1)

According to Methanex, the FTC interpretation is an amendment and not an interpretation because it supposedly reads the "fair and equitable treatment" and "full protection and security" phrases "out of NAFTA" and is "contrary to the intent of Chapter Eleven's drafters, as shown by the Aguilar Declaration." Methanex FTC Reply at 4, 9. For the reasons below, these new assertions – like those in Methanex's prior submissions – are unpersuasive.

First, Methanex is correct in observing that, under the FTC's binding interpretation, the phrases "fair and equitable treatment" and "full protection and security" would have a content no broader "than the phrase preceding them, 'in accordance with international law.'" *Id.* at 4. Far from violating any principle of treaty interpretation, however, such an interpretation accords with the ordinary usage of the word "including." As is commonly understood, when a general principle is followed by the word "including," the terms or examples that ensue are encompassed within that general principle. Thus, it should come as no surprise that Article 1105(1)'s meaning would remain the same regardless of whether that Article required "treatment in accordance with international law" or whether it required "treatment in accordance with international law, including fair and equitable treatment and full protection and security."

Second, Methanex cites nothing in the NAFTA, or any other authority, authorizing Chapter Eleven tribunals to second-guess whether a binding interpretation issued by the FTC is, in fact, an interpretation. Tribunals are required by Article 1131(2) to apply, as governing law, the FTC interpretations that the NAFTA expressly provides for. Allowing tribunals to sit in judgment to determine whether what the FTC has identified as an

interpretation really is an interpretation would stand the Article 1131 requirement on its head. Moreover, doing so could very well lead to manifestly unreasonable results because different tribunals might differ regarding whether any particular statement identified by the FTC as an interpretation was, in fact, an interpretation and part of the law governing proceedings before all Chapter Eleven tribunals.

Third, there is no merit to Methanex's assertion that the FTC interpretation is an attempt to amend Article 1105(1) because the interpretation is contrary to the intent of the Parties supposedly reflected in preparatory work for Chapter Eleven.[1] As a preliminary matter, *travaux préparatoires* may be considered for the purpose Methanex suggests only when the terms of a treaty are "ambiguous or obscure," in light of the treaty's context (including any subsequent agreements) and object and purpose.[2] There is nothing "ambiguous or obsure" about NAFTA Article 1105(1), as clarified by the Free Trade Commission. That Article plainly does not require treatment beyond the customary international law minimum standard of treatment of aliens. Nor is there any ambiguity with respect to the NAFTA's requirement, set forth clearly in Article 1131(2), that the Free Trade Commission's interpretation is binding on the Tribunal. Resort to *travaux préparatoires* would therefore be inappropriate here, even if Methanex had offered any.

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[1] Because the Tribunal noted in its letter, dated November 28, 2001, that it has not yet taken a view on the merits of the parties' arguments concerning the Aguilar Declaration, the United States reasserts here some of the points made in its letter dated October 11, 2001 and its submission dated November 21, 2001.

[2] *See, e.g.,* Vienna Convention on the Law of Treaties, art. 32; David Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953, 973 (1994) ("Resort to extrinsic evidence of the parties' intent, including travaux, is meant to be only an exceptional occurrence."); *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 194 (1993) (Blackmun, J., dissenting) ("Reliance on a treaty's negotiating history (travaux préparatoires) is a disfavored alternative of last resort, appropriate only where the terms of the document are obscure or lead to 'manifestly absurd or unreasonable' results.") (quoting Article 32 of Vienna Convention).

In any event, the Declaration of Guillermo Aguilar Alvarez is not *travaux préparatoires* but a statement by a paid fact witness as to his recollection of what transpired in discussions that occurred over nine years ago – a recollection unsupported by any of the *travaux* that Mexico or counsel for the United States could locate after a diligent search. Moreover, as underscored by the International Court of Justice's decision in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, *travaux* such as those that do exist for the NAFTA "must be used with caution . . . on account of their fragmentary nature." 1995 I.C.J. 5, 21 ¶ 41 (Feb. 15). As Mexico – which "strongly disagrees" with Mr. Aguilar regarding the history of the NAFTA negotiations and position of the Government of Mexico with respect to Article 1105 – notes, the "views of a single former government official (expressed more than nine years after the completion of negotiations) are not the *travaux préparatoires* referred to as supplementary means of interpretation under Article 32 of the Vienna Convention." *See* Ltr. from Hugo Perezcano Díaz to the Tribunal, dated Nov. 21, 2001.

In addition, as illustrated by *Maritime Delimitation*, the Aguilar Declaration is legally irrelevant in any event. In that case, Bahrain asserted that the deletion from a draft treaty of a phrase consistent with Qatar's position proved that Bahrain's interpretation was the correct one. *Id*. at 22 ¶ 41. Because the *final* text did not exclude Qatar's interpretation, however, the Court was "unable to see why the abandonment of a form of words corresponding to the interpretation given by Qatar to the[] [treaty] should imply that the [treaty] must be interpreted in accordance with Bahrain's thesis." *Id.* Just so here: even if Mr. Aguilar's recollection had any support, it would make no difference

because the text of Article 1105(1) as adopted is fully consistent with the FTC interpretation.

Finally, the Aguilar Declaration does not support Methanex's assertion because the declaration makes no sense. Mr. Aguilar asserts that Mexico (as well as the United States) wanted to limit the scope of the obligations prescribed by Article 1105(1). *See, e.g.*, Aguilar Decl. ¶¶ 12, 13. He further asserts that Mexico sought to accomplish this not by restricting Article 1105(1) to customary international law, but by ensuring that the Article incorporated obligations under both conventional and customary international law – despite Mexico's "aware[ness] that treaty law could also have the effect of broadening the standard to which it could be held by NAFTA investors and their investments." *Id.* ¶¶ 16, 17. According to Mr. Aguilar, Mexico believed that by entering into treaties "the scope of article 1105(1) could in fact be narrowed in certain circumstances," *id.* ¶ 16: "For instance, if treatment of investors by Mexico was found to be 'in accordance with international law' (including treaty law), it could arguably be consistent with NAFTA article 1105(1) even if it departed from other customary principles." *Id.* ¶ 17.

Mr. Aguilar, however, offers no basis for ascribing to Mexico such a patently erroneous view. It is fundamental that a treaty between Mexico and a non-NAFTA Party derogating from customary international law could in no way lessen Mexico's obligations under Article 1105(1) of the NAFTA. As Article 34 of the Vienna Convention on the Law of Treaties recognizes: "A treaty does not create either obligations or rights for a third State without its consent."

Thus, Methanex has provided no evidence – much less any compelling evidence – that the FTC interpretation is contrary to the intent of the drafters of Chapter Eleven, even

if there were any reason to resort to supplementary means of determining that intent (which there is not). Nor can Methanex demonstrate that the FTC interpretation is an amendment (rather than an interpretation) of the NAFTA.

II. METHANEX'S ARGUMENTS CONCERNING ARTICLE 1105(1) AS INTERPRETED BY THE FTC ARE WITHOUT MERIT

Contrary to Methanex's assertions, the FTC interpretation is unambiguous, and, therefore, not subject to the extra-textual arguments Methanex offers. *See* Methanex FTC Reply at 1, 3. It clearly states that the correct interpretation of the reference to "international law" in Article 1105(1) is to "the customary international law minimum standard of treatment of aliens." FTC Interpretation ¶ B(1). Methanex's attempts to ascribe to that standard content based on the notion of what is "fair" or "equitable" fail.

First, as the United States has now repeatedly pointed out, the phrase "fair and equitable treatment" does indeed have a "well-understood" meaning in State practice concerning investment treaties: it is understood to refer to the customary international law minimum standard of treatment of aliens. Methanex FTC Reply at 5; *see* U.S. FTC Response at 5-6; U.S. Mem. at 39-42; U.S. Reply at 23-24; U.S. Rejoinder at 22-23; Hearing Tr. at 241-45. Methanex errs in its reliance on municipal-law sources in an attempt to prove otherwise. *See* Methanex FTC Reply at 5 (citing Methanex's Sept. 18, 2001 Submission at 4-5). The NAFTA is governed by international law, not municipal law, and unrelated municipal law sheds no light on the treaty provisions concerning treatment of foreign-owned investments at issue here. *See* U.S. Reply at 8 (citing NAFTA arts. 102(2) & 1131(1)); *see also* Vienna Convention on the Law of Treaties arts. 31-32 (nowhere suggesting that such municipal law is relevant to interpreting a treaty).

Second, as demonstrated previously, the content ascribed to the customary international law minimum standard of treatment by Methanex – that of general notions of fairness, equity and "appropriate protection" – is incorrect. *See* U.S. FTC Response at 6-7 (citing decisions demonstrating that international courts and tribunals apply the general principles of equity and good faith as interpretive guides, and not as independent obligations in international law; noting that cases cited by Methanex do not address the concepts of "fairness," "due process" or "appropriate protection").

Third, Methanex errs in attempting to substitute the *purpose* of the United States' BIT program for the specific substantive *standards* prescribed to achieve that purpose. The United States acknowledges, as stated in the fact sheet pertaining to the United States' BIT program posted on the Department of State's website, that one of the fundamental aims of the United States' BITs is to promote "market-oriented domestic policies that treat private investment fairly."[3] Indeed, each of the legal obligations set out in the BITs – the obligations of national and most-favored-nation treatment, the prohibition on uncompensated expropriations and the requirement that investment-related transfers be permitted to be made freely and without delay, as well as the general treatment standard – is designed to further this fundamental goal. That fact, however, does not permit a tribunal such as this one to ignore the legal standards adopted by the Parties and instead choose its own means to achieve the Parties' end.[4]

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[3] Fact Sheet, U.S. Bilateral Investments Treaty Program, Bureau of Economic & Business Affairs, Office of Investment Affairs (Nov. 1, 2000), *available at* <http://www.state.gov/www/issues/economic/7treaty.html>.

[4] The International Court of Justice recognized this distinction between a treaty's goals and treaty obligations in *Oil Platforms* (*Iran v. U.S.)*, 1996 I.C.J. 803 (Dec. 12). In that case, Iran claimed that the United States violated a bilateral treaty of amity, economic relations and consular rights when the United States destroyed three offshore oil production complexes. Specifically, Iran alleged that the United States breached an article of the treaty providing that "there shall be firm and enduring peace and sincere

Fourth, contrary to Methanex's suggestion, a vote of a single committee in one house of Congress on proposed legislation pertaining to negotiating objectives for a later trade agreement sheds no light on the proper interpretation of NAFTA Article 1105(1). *See* Methanex FTC Reply at 7 n.3. & 10 n.4. There is simply no support in Articles 31 or 32 of the Vienna Convention on the Law of Treaties for reference to such a vote. Indeed, even under United States municipal law, such action would not be considered persuasive evidence of the intent of the legislature.[5]

Finally, while the United States agrees that the same set of facts could theoretically violate both Article 1105(1) of the NAFTA and another conventional treaty obligation, the FTC interpretation is clear 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 Interpretation ¶ B(3). When determining whether a NAFTA Party has breached Article 1105(1), it is, therefore, legally irrelevant whether the subject conduct would have also constituted a breach of another obligation contained in a different international agreement. There is thus no merit to Methanex's suggestion that NAFTA tribunals should "consider[] whether such non-NAFTA obligations have been violated." Methanex FTC Reply at 9.

In sum, the "critical" question is not whether "California [was] required to treat Methanex fairly and equitably," *id*. at 12, but, rather, whether Methanex was denied

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friendship" between the parties. Upholding the United States' jurisdictional objection to that portion of Iran's claim, the Court held that the aforementioned article "must be regarded as fixing an objective, in light of which the other Treaty provisions are to be interpreted and applied," but could not be the basis on which a breach of the treaty might be found. *Id.* at 814.

[5] *See, e.g., Pension Benefit Guaranty Corp. v. LTV Corp.,* 496 U.S. 633, 650, 110 S. Ct. 2668, 2678 (1990) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is

treatment in accordance with the customary international law minimum standard of treatment of aliens. As set forth in the written and oral submissions of the United States, Methanex has failed even to identify any rule of customary international law that allegedly has been violated by the United States.

III. ADDITIONAL AUTHORITIES OFFERED BY THE UNITED STATES

In addition to the authorities previously submitted by the United States, it offers the following:

In the U.S. FTC Response (at 4), the United States noted "the longstanding debate among academics (not among States) concerning 'fair and equitable treatment' [and] whether the phrase should be interpreted to refer to the customary international law minimum standard of treatment of aliens or to incorporate some new standard based on subjective notions of what is 'fair' or 'equitable.'" The United States notes that the article by Stephen Vasciannie, which is repeatedly relied upon by Methanex, expressly confirms the existence of this debate. *See* Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT'L L. 99, 102-04 (1999) ("At least two different views have been advanced as the precise meaning of the term 'fair and equitable treatment' in investment relations. One possible approach is that the term is to be given its plain meaning . . . . The second approach to the meaning of the term suggests that fair and equitable treatment is synonymous with the international minimum standard in international law.").

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particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.") (citations and internal quotations omitted).

In addition, the United States has, in previous submissions, noted the general rule in international law that interpretations of treaties apply to pending cases and, therefore, have, in a sense, a retrospective effect. *See* U.S. FTC Response at 5; U.S. Post-Hearing Submission, July 20, 2001, at 4-5. The United States notes that additional support for this proposition may be found in the advisory opinion of the Permanent Court of International Justice in *Access to German Minority Schools in Upper Silesia*, which found that, "in accordance with rules of law, the interpretation given by the Court to the terms of the Convention has retrospective effect – in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation." 1939 P.C.I.J., ser. A/B, no. 40, at 19.

CONCLUSION

For the foregoing reasons, and those stated in its submission of October 26, 2001, the United States respectfully submits that the Tribunal should reject the assertions made by Methanex in its submissions of September 18 and November 9, 2001, and, in accordance with Article 1131(2), give full effect to the July 31, 2001 interpretation of the NAFTA Free Trade Commission.

Respectfully submitted,

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