IN THE ARBITRATION UNDER
CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND
UNDER THE UNCITRAL ARBITRATION RULES

between

METHANEX CORPORATION,

Claimant/Investor,

and

THE UNITED STATES OF AMERICA,

Respondent/Party.

CLAIMANT METHANEX CORPORATION'S REQUEST TO LIMIT AMICUS CURIAE SUBMISSIONS TO LEGAL ISSUES RAISED BY THE PARTIES

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The Tribunal determined on January 15, 2001, that it had the power to consider written *amicus curiae* submissions. Influenced by the central responsibility to ensure that Methanex "should receive whatever procedural protection might be necessary," the Tribunal rejected the notion that it must accept all *amicus curiae* submissions *in contenenti*, deciding instead to consider carefully the application of appropriate procedural limitations governing such submissions. (Decision of the Tribunal on Petitions From Third Persons To Intervene As Amici Curiae ("Tribunal Decision") ¶¶ 37, 52-53.) The parties to this dispute were able to reach agreement regarding most *amicus curiae* issues, but they were unable to do so regarding one critical point – whether *amici* statements should be limited to commenting on legal issues as opposed to factual issues. (March 31, 2003, Hearing Transcript, at 109, 117.)

For the reasons set forth below, Methanex requests that the Tribunal limit *amicus* submissions to legal issues raised by the parties and reject submissions that raise issues of fact.

I. In NAFTA Proceedings, Presenting Factual Evidence Is the Role of Experts, Not *Amici*

Article 1133 of NAFTA already provides a procedure for obtaining supplemental factual evidence – the Tribunal may appoint experts to report to it in writing on any factual issue. Neither NAFTA nor the UNCITRAL Rules expressly identify any other procedure for adducing factual evidence. Moreover, the Tribunal's right to obtain supplemental factual evidence is *not* open-ended. Rather NAFTA Article 1133 permits the Tribunal to appoint experts in only two circumstances: (1) at the request of a disputing party; or (2) on its own initiative "unless the disputing parties disapprove." (NAFTA Article 1133.) Accordingly, pursuant to the express terms of Article 1133, the Tribunal cannot appoint experts without the consent of the disputing parties. Here, it would be anomalous to permit expert evidence through the *amici* process when the Tribunal clearly would be unable to do so through the Article 1133 process absent consent of the parties.

The Tribunal has already concluded that "*Amici* are not experts," *see* Tribunal Decision ¶ 38, and they should not be treated like expert witnesses who are permitted to submit written factual testimony. This is consistent with the Tribunal's determination that *amicus* submissions "could not adduce the evidence of any factual or expert witness," *see id.* ¶ 36, and with the U.S. position: "*Amici* clearly do not serve the same function as tribunal-appointed experts which are the subject of Article 1133." (Statement of Respondent United States in Response to Canada's and Mexico's Submissions Concerning Petitions for *Amicus Curiae* Status ("U.S. Statement"), at 3.)

To allow non-expert *amici* to present factual evidence would effectively render Article 1133 superfluous and useless. The fundamental principle of *effet utile* prohibits a treaty interpreter from adopting a meaning that would reduce parts of a treaty to redundancy or inutility. (*Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ("*Canada-Dairy*"), WT/DS103/AB/R, WT/DS113/AB/R (13 October 1999) ¶ 133.) Thus, to remain consistent with NAFTA procedures, *amici* should not be allowed to submit factual material.

II. *Amici* Should Not Have Greater Rights Than Mexico or Canada

Article 1128 governs the participation of non-disputing NAFTA Parties such as Mexico and Canada. It provides that the Party "may make submissions to a Tribunal on a question of interpretation of this Agreement," which quite clearly contemplates only legal submissions. This limited scope is the full extent of participation permitted by the NAFTA Party under Chapter Eleven. (*See* Communication from Mexico, November 10, 2000, ¶¶ 4-7 (cautioning that Article 1128 provides only limited rights to NAFTA Parties and warning against *amici* having greater rights than the NAFTA Parties themselves.)) (Exhibit 1.) Were *amici* permitted to present factual evidence, it would create precisely the asymmetrical participation that Mexico objected

to. Reading the text of Chapter Eleven in context and in light of its object and purpose, this could not be its intent with respect to Parties and *amici*.

III. *Amicus* Submissions In the United States Focus on Issues of Law

At the hearing last month, the United States argued that U.S. courts consider factual as well as legal issues in *amicus* submissions. (March 31, 2003, Hearing Transcript, at 114-15.) In the United States, however, "[t]he classic role of an *amicus curiae* is to assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention *to law* that might otherwise escape consideration." (20A *James Wm. Moore, Moore's Federal Practice* § 329.11 (3d ed. 2002) (emphasis added).) Furthermore, *amici* ordinarily may not raise issues not presented by the parties. (*Id.*)

In fact, the bulk of *amici* participation in the United States occurs at the appellate level, where the reviewing court's focus is squarely on issues of law. At the trial level, where the focus of the court is more on factual matters, *amicus* submissions are less frequent and, despite the broad discretion of trial courts to permit such participation, often discouraged.[1] For example, in *Goldberg v. City of Philadelphia*,[2] a U.S. trial court denied a fraternal organization of Jewish law enforcement officers and fire fighters leave to file an *amicus* brief in a case involving a Jewish police officer that alleged religious discrimination. The court's reasoning hinged on the conclusion that the submission would not help elucidate legal issues.[3] Accordingly, the well recognized focus of *amici* submissions in the United States is on issues of law, not on supplemental factual presentations. This Tribunal should adopt the same approach.

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[1] *See, e.g., Liberty Lincoln Mercury v. Ford Mktg. Corp*, 149 F.R.D. 65, 82 (D.N.J. 1993), *partial summary judgment granted, dismissed, on other grounds,* 923 F. Supp. 665 (D.N.J. 1996); *Leigh v. Engle*, 535 F. Supp. 418, 419-20 (N.D. Ill. 1982).

[2] No. 91-7575, 1994 U.S. Dist. LEXIS 9392 (E.D. Pa. July 12, 1994).

[3] *Id.* at *2-3.

IV. Equity and Fairness Require Confining *Amicus* Submissions to Issues of Law, Not Fact

UNCITRAL Article 15(1) permits the Tribunal to "conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." (UNCITRAL Arb. R. 15(1).) As the Tribunal has properly recognized, although Article 15(1) grants the discretion to accept *amicus* submissions, such power is "subject always to the requirements of procedural equality and fairness towards the Disputing Parties." (Tribunal Decision ¶ 26; *see also UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae ¶ 69 (Oct. 17, 2001)) (Tribunal discretion is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process).

Allowing *amici* to present additional factual evidence would unnecessarily complicate the process and possibly delay even further these already protracted proceedings. Methanex is a private company that is fighting against an array of U.S. federal and state agencies as well as Canada and Mexico. And based on the facts of *this* case, with its already extraordinarily complex and broad record, there is no apparent need for evidence beyond what the parties to the dispute deem relevant. Requiring Methanex to respond to still more facts presented by third parties would be a heavy and unjustifiable burden.[4]

Similarly disadvantaged WTO Members – namely, smaller or poorer nations – have made the same objection:

[4] At a minimum, if permitted by the Tribunal, any new record facts should be limited to nonadjudicative facts that a court can accept through judicial notice. *See* Fed. R. Evid. 201(a) (allowing a court to take judicial notice of facts that are not subject to reasonable dispute and whose accuracy cannot reasonably be questioned).

- Jordan expressed Methanex' view here succinctly:[5]

> The key is that, when exercising their discretion, the panel or the Appellate Body should not undo its implicit duty to respect due process and should ensure that unsolicited briefs *do not extend to factual issues* and that the parties to the dispute have ample time to react to same. It should always be taken into consideration, that the unsolicited *amicus curiae* briefs will only be used to evaluate arguments made by the parties to the dispute and not to make the case for the complainant or the respondent.[6]

- The African Group – a conglomeration of developing-country Members from Africa speaking with one common voice – similarly underscored Methanex' point:

> '*Amicus curiae*' translates in common parlance as 'friends of the court' and is ordinarily understood to refer to respected experts that the court may request for additional advice and guidance *on issues of law* and interpretation and issues requiring expert knowledge. *The term is not ordinarily used in reference to the adducing of factual evidence in support of a party's case*.[7]

- India and Hong Kong have also objected to having to respond to *amicus* submissions because doing so would place a burden on parties and third parties, particularly developing-country Members.[8]

Finally, accepting factual submissions from *amici will* "add significantly to the overall cost of the arbitration." (Tribunal Decision ¶ 50.) Moreover, the fact that the bulk of the *amicus* submissions are "more likely to run counter to the Claimant's position" means that Methanex will bear the brunt of any such increased costs. (*Id*.) Even a cursory examination of the relative resources of the disputing parties illustrates that permitting *amici* to present factual information

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[5] *See* WTO, *Jordan's Contributions Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/43 ¶¶ 33-35 (28 January 2003).

[6] *Id.* ¶ 35 (emphasis added).

[7] WTO, *Negotiation on the Dispute Settlement Understanding*, TN/DS/W/15 § 10(b) (25 September 2002) (emphasis added).

[8] *See* WTO, Minutes of Oct. 23, 2002, Meeting ("*WTO Minutes*") WT/DSB/M/134 ¶¶ 54, 63 (29 January 2003).

creates a burden for Methanex and a corresponding significant advantage to the United States. The Tribunal should not allow so unequal an outcome.

V. Conclusion

For all the reasons set forth above, Methanex respectfully requests that the Tribunal prohibit factual submissions from *amici*.

Respectfully submitted,

s/ Christopher F. Dugan
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Dated: April 15, 2003

WDC/240761.16

EXHIBIT 1

Communication from Mexico, November 10, 2000