

In accordance with the Tribunal's directions, this Submission addresses two questions: (1) whether the litigation submissions of NAFTA State Parties ("Parties") constitute a subsequent interpretive agreement under Article 31(3)(a) of the Vienna Convention on the Law of Treaties ("VCLT"); and (2) Methanex's observations on the jurisdictional decision of the International Court of Justice in the *Oil Platforms* case. Also attached as part of this Submission are the Joint Comments of Professor Sir Robert Jennings, QC and Sir Ian Sinclair, KCMG, QC ("Joint Comments").

## **I. THE PARTIES' SUPPOSED INTERPRETIVE AGREEMENT**

As Methanex demonstrated in its Rejoinder, and again at the jurisdictional hearing, the inconsistencies between the past and current positions of the Parties concerning various NAFTA terms undermine any claim that the current positions reflect a subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. *See* Methanex Rejoinder at 43-45; 07/11/01 Tr. at 72:20-76:20. It is thus not surprising that the United States and Mexico (but not Canada) have seized upon the Tribunal's reference to Article 31(3)(a) as a means of salvaging their arguments by now characterizing them as a "subsequent agreement" among the Parties. However, as shown below, the Parties' litigation positions are not an agreement, and even if they were, the Tribunal need not, and should not, allow the Parties to use this device to restrict their obligations to investors whose interests are expressly protected by NAFTA.

### **A. The Alleged Agreement Is Not Binding On This Tribunal**

As a preliminary matter, the Vienna Convention makes clear that a "subsequent agreement," like a "subsequent practice," is merely a factor to be "taken into account" by the Tribunal. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (May 23, 1969), art. 31(3). Thus, even if there were a "subsequent agreement" among the Parties, it would

not be binding on this Tribunal. *See* Joint Comments of Sir Robert Jennings and Sir Ian Sinclair (“Joint Comments”) ¶¶ 1, 12. Indeed, Mexico itself must have recognized this limitation when it noted that:

Interpretations placed upon legal instruments by the parties to them, *though not conclusive* as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.

Mexico’s May 15, 2001 Submission ¶ 2 (quoting *Advisory Opinion on the Status of South West Africa*, 1950 I.C.J. Reports 129, 135) (emphasis added).

For all the reasons set forth below, the Tribunal should give no weight to the supposed “agreement.”

**B. The Parties’ Litigation Submissions Are Not An Agreement**

The Parties’ litigation submissions do not have the attributes of an “agreement.” The United States points only to snippets of its litigation briefs as representing its contribution to the “agreement,” and the views of Canada and Mexico are contained only in NAFTA Article 1128 submissions. As described below, such disjointed submissions are not a vehicle designed to create the kind of international agreement contemplated by VCLT Article 31(3)(a).

More importantly, only Mexico and the United States have made oral statements that their written submissions constitute an agreement. In contrast, Canada has never stated that it views its Article 1128 submission in these proceedings as intended to establish a formal, binding agreement within the meaning of Article 31(3)(a), and the Canadian representative notably refrained from making any such claim during the jurisdictional hearing. Canada’s failure to state that its independent submission in this litigation rises to the level of a “subsequent agreement” conclusively eliminates any basis for finding that such an agreement exists.

**1. None of the Parties Has Established That Their Representatives Have Authority To Enter Into An Interpretive Agreement**

An obvious prerequisite of any subsequent interpretive agreement is that the persons entering into the supposed agreement have legal authority to do so. *See* VCLT Article 7; *Restatement (Third) Foreign Relations Law of the United States (“Restatement”)* § 311, cmt. b. None of the Parties has shown that its representative has that authority here.

Under U.S. law, the authority to interpret a treaty or international agreement is vested in the President. *See Restatement* § 326(1). The Department of State itself has recognized as much:

The Senate Foreign Relations Committee asked the State Department: ‘Would you agree that the President is not able to alter the terms of an existing treaty in any significant way without the consent of the Senate?’ The Department responded: ‘Yes. However, he may interpret a treaty and secure the agreement of the other party or parties for a particular interpretation or method of implementation.’

Michael J. Glennon, *Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction*, 79 A.J.I.L. 682, 687 (1985).

While the President may delegate his authority, NAFTA by its own terms is a *trade agreement*, and authority to negotiate and interpret such agreements has been delegated not to the State Department, but to the United States Trade Representative. Under U.S. law, “primary responsibility for developing, and for coordinating the implementation of, United States international trade policy” is vested in the U.S. Trade Representative. 19 U.S.C. § 2171(c)(1)(A). It is the Trade Representative who acts “as the principal spokesman of the President on international trade,” *id.* § 2171(c)(1)(E), and who has the responsibility to “issue and coordinate policy guidance to departments and agencies on basic issues of policy and

*interpretation* arising in the exercise of international trade functions.” *Id.* § 2171(c)(1)(D) (emphasis added).

The Tribunal cannot simply assume, and the Department of State has not established, that the President or the Trade Representative have delegated their authority to interpret NAFTA to the State Department. And even if that delegation has been made, the United States has not established that such delegated powers can be exercised by Mr. Bettauer, Deputy Legal Advisor for the United States Department of State, the highest-ranking official of the State Department participating in this proceeding. Indeed, and with all due respect to the State Department attorneys, it is worth remembering that the precise reason the United States rejected a proposed provision in the Vienna Convention that would have allowed subsequent practice to modify a treaty was its concern that “an agreement might be deemed amended as a result of unauthorized actions by low-ranking officials.” *Id.* § 334 Reporter’s Note 2.

Similarly, Mexico has not established that its representative has the requisite authority, and Canada has not even asserted that there is any agreement, much less established the appropriate authority. Until such authority is properly established, by each of the Parties, the Parties’ current litigation submissions cannot be treated as an agreement.

## **2. NAFTA Authorizes the Free Trade Commission to Issue Subsequent Interpretive Agreements**

NAFTA creates a specific mechanism for establishing interpretive agreements: Article 2001(2)(c) expressly vests the power to “resolve disputes that may arise regarding [NAFTA’s] interpretation or application” in the NAFTA Free Trade Commission. Significantly, Article 2001 makes no distinction between disputes arising between the Parties themselves, and disputes between a Party and an investor. Furthermore, Article 1131(2) makes “[a]n interpretation by the

Commission of a provision of [NAFTA] binding on a Tribunal established under” Chapter Eleven.<sup>1</sup>

In sharp contrast, Article 1128 provides not a mechanism for Party agreement, but a mechanism by which a non-disputing Party may make its independent views known to a particular Tribunal in a particular dispute. Such views, even when the Parties agree, are in no way binding on the Tribunal. *See* Joint Comments ¶¶ 1, 4. Had the Parties intended Article 1128 to provide a means for establishing joint, authoritative interpretations of NAFTA, they could easily have said so. And, as demonstrated below, Article 1128 litigation submissions are, by their very nature, an inadequate mechanism for establishing and defining an “agreement.”

Consequently, if the Parties are to invoke a NAFTA procedure for creating a subsequent interpretive agreement, it should be Article 2001, not Article 1128.

### **3. The Parties’ Current Positions Are Too Inconsistent And Ambiguous To Constitute An Agreement**

The United States’ “subsequent agreement” claim also fails for the simple reason that there is, in fact, no agreement among the Parties. The Parties’ positions concerning the proper interpretation of NAFTA are so inconsistent and ambiguous as to be legally meaningless.

A review of the Parties’ current positions on the meaning of Article 1110(1) demonstrates the absence of any clear agreement.

#### **The U.S. Position:**

“[T]he normal and natural meaning of the term ‘relating to’ as used in the context of Article 1101(1) is not ‘affecting,’ but embodies the requirement of a legally significant connection between the measures at issue and the claimant investor or its investment.” U.S. Rejoinder at 46.

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<sup>1</sup> This is not to say that only the Free Trade Commission can establish binding interpretations of NAFTA’s provisions. In the absence of a controlling ruling by the Commission, one of the primary purposes of a Chapter Eleven tribunal is to resolve interpretive disputes.

**Canada's Position:**

In contrast to the positions it has asserted in other fora, Canada now asserts “that the term ‘relating to’ requires a significant connection between the measure at issue and the essential nature of investment.” Canada’s May 2, 2001 Submission ¶ 23.

**Mexico's Position:**

Mexico asserts that “[t]he test adopted for the purposes of Article 1101 must reflect the NAFTA drafters’ intent to require a more direct nexus between the measure and the investor or its investment than mere effect. . . .” Mexico’s May 15, 2001 Submission ¶ 8.

Each of these positions is substantially different, in two respects. First, a “legally significant connection” is different from “a significant connection,” and both are different from “a more direct nexus.” How, for example, is the Tribunal to interpret and reconcile the evident difference between “significant” and “legally significant”? Second, Canada focuses on a measure’s connection with the “essential nature of the investment.” Mexico and the United States do not. Accordingly, the Parties’ positions are too inconsistent, and the inconsistent terms are too ambiguous, to constitute an agreement on this issue. It is simply not the Tribunal’s role to amend the Parties’ writings to create an unambiguous agreement where none now exists.<sup>2</sup>

Similarly, the Parties’ positions on Article 1105 are inconsistent.

**The U.S. Position:**

“Article 1105(1) does not create a standard of fair and equitable treatment unknown to customary international law.” U.S. Reply at 23. “[B]ased on the plain language, structure and historical context of Article 1105(1), the treatment required by the Article is that of the international minimum standard of customary international law.” *Id.*

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<sup>2</sup> This issue is also now academic, for the United States has conceded that if an investor credibly alleges that a measure intentionally discriminates, “then the measure ‘relates to’ the foreign-owned investor or investments.” 07/13/01 Tr. at 530:6-531:12. In this case, Methanex has credibly alleged that California intended the measures at issue to discriminate in favor of domestic ethanol producers to the detriment of what it perceived to be a “foreign” methanol industry. Consequently, under the standard proffered by the United States, the California measures “relate to” Methanex.

“[T]he drafters of Chapter Eleven excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment. Accordingly, they chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard rather than some subjective, undefined standard.” U.S. Memorial at 42.

**Canada’s Position:**

“Canada submits that ‘fair and equitable treatment’ is subsumed in the international minimum standard of treatment recognized by customary international law.” Canada’s May 2, 2001 Submission ¶ 33.

**Mexico’s Position:**

“Mexico concurs with the United States that Article 1105 establishes only an international minimum standard of customary international law in which ‘fair and equitable treatment’ is subsumed.” Mexico’s May 15, 2001 Submission ¶ 9.

These statements are too vague and ambiguous to provide the Tribunal with any meaningful guidance concerning the scope of the Parties’ obligations under Article 1105. For example, Canada and the United States<sup>3</sup> refer to “the” international minimum standard, apparently referring to the standard which Mexico, as a proponent of the Calvo Doctrine, never adopted. Mexico, in contrast, refers to “an” international minimum standard, without ever defining whether this is the old standard it has always rejected, or some new standard. Nor do the Parties agree on the current scope of customary international law or “the” or “an” international minimum standard. For example, Mexico has expressly stated that “[t]he fair and equitable

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<sup>3</sup> The United States now concedes “that the international minimum standard is not a standard frozen in the 1920s. It is an evolving standard. It is one that, like other rules of international law, evolves through state practice.” *See* 07/13/01 Tr. at 514:11-15. As Methanex has repeatedly demonstrated, the rapid proliferation of bilateral investment treaties (BITs), as well as numerous multilateral treaties, all of which impose broad obligations of “fair and equitable treatment” and “full protection and security,” are compelling evidence of current State practice with regard to the treatment of foreign investors and investments. *See* map supplied to the Tribunal at the hearing on July 11, 2001 showing countries which have entered BITs and multilateral treaties guaranteeing fair and equitable treatment; *see also* Methanex Rejoinder at 47; 07/11/01 Tr. at 84:14-85:17; 07/13/01 Tr. at 404:16-407:7. However, it is not clear from the Parties’ submissions whether they agree or disagree whether this nearly universal State practice is part of customary international law or part of “the” or “an” international minimum standard.

treatment standard requires the Respondent [State] to act in good faith.” *Metaclad Corp. v. Mexico*, Mexico’s Counter Memorial ¶ 841; *see also Azinian v. Mexico*, Mexico’s Counter Mem. ¶ 251. In sharp contrast, the United States has argued throughout these proceedings that Article 1105 imposes no general obligation of good faith. *See, e.g.*, U.S. Reply at 27-30; U.S. Rejoinder at 25-28. In short, the supposed agreement is so nebulous that even if the Tribunal were to adopt the Parties’ attempt to limit Article 1105, it is impossible to know the substantive content of an “interpreted” Article 1105.

What is beyond dispute is that Article 1105 imposes on the Parties an express obligation to provide investors and their investments with both “fair and equitable treatment” and “full protection and security.” The Tribunal’s task is to determine whether, on the particular facts of this case, the United States has breached that obligation.

The Parties do not agree on the standard of causation in Articles 1116 and 1117.

### **The U.S. Position**

“A loss or damage is not incurred ‘by reason of, or arising out of’ a breach within the meaning of Article 1116(1) unless the alleged breach is the proximate cause of the claimed losses.” U.S. Memorial at 16.

### **Canada’s Position**

“The ordinary meaning of the words ‘by reason of, or arising out of’ establishes that there must be a clear and direct nexus between the breach and the loss or damage incurred. *In other words, the breach of the obligation must cause the loss or damage.*” Canada’s May 2, 2001 Submission ¶ 47 (emphasis added).

### **Mexico’s Position**

Mexico did not express any views on this issue, nor did it adopt those of the United States

Canada’s position is internally inconsistent, as it seems to embrace two different standards of causation, and Mexico agrees with neither Canada nor the United States.

And, again, the Parties do not agree on the scope of Article 1139, and whether goodwill is a form of intangible property.<sup>4</sup>

### **The U.S. Position**

“There is no mistaking that goodwill, market share and customer base are not among the items listed in Article 1139. Nor are those items subsumed within subparagraph (g) of Article 1139.” U.S. Rejoinder at 43 (internal citation omitted).

### **Canada’s Position**

“The Tribunal must determine whether ‘market share, market access, operations and goodwill’ are recognized as intangible property.” Canada’s May 2, 2001 Submission ¶ 61 (footnote omitted).

### **Mexico’s Position**

“In its Counter-Memorial on Jurisdiction, Methanex includes in its identification of its investments ‘market share’ and ‘goodwill and contends that these are intangible assets and ‘investments’ which are capable of being expropriated under NAFTA.”

“Insofar as these intangibles are concerned, Mexico disagrees. At best, these are the intended results of investments, and their existence in and of themselves do not answer the threshold question as to the presence of an investment as defined in Article 1139.” Mexico’s May 15, 2001 Submission ¶¶ 18-19.

Thus, Canada has not adopted the view that goodwill is not a form of intangible property protected by 1139. And, as Methanex has already demonstrated, *every* definition of intangible property found in textbooks, financial dictionaries, and other sources includes goodwill. *See* Methanex Counter Memorial at 17-18; 07/11/2001 Tr. at 106:9-107:15. The fact that the United States and Mexico are now trying to exclude from Article 1139 specific types of intangible property that undeniably fall within the term’s ordinary meaning is convincing evidence that they are attempting to amend NAFTA, not merely “interpret” it.

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<sup>4</sup> The Parties do agree “that Article 1139 provides an exhaustive, and not an illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.” U.S. Rejoinder at 42 (footnotes omitted). But this issue is not in dispute. To the contrary, Methanex asserts that its goodwill and market access are “intangible” property and investment interests *within* the meaning of Article 1139. *See* Methanex Rejoinder at 61-62.

#### 4. Article 31(3)(a) Requires Some Type of Formal Agreement

The Vienna Convention contemplates an agreement that is far more formal than the Parties' oral assertions that their vague and disputatious litigating positions constitute an agreement. The VCLT's negotiating history, international law, and practical considerations all require a formal document whose contents can be readily understood and generally known.

The negotiating history of Article 31(3)(a) demonstrates that the term "subsequent agreement" refers to a formal, joint exchange between the treaty parties. As originally drafted by the International Law Commission ("ILC"), what ultimately became Article 31(3)(a) read as follows:

Article 73 — Effect of a later customary rule or of a later agreement on interpretation of a treaty

The interpretation at any time of the terms of a treaty under articles 70 and 71 shall take account of –

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(b) any later agreement between all the parties to the treaty and relating to its subject matter;

1964 Y.B. Int'l L. Comm'n (Vol. II) at 53. In submitting the draft to the ILC, the comment of the Special Rapporteur (which was read to this Tribunal during the hearing) explained that "Sub-paragraph (b) deals with the effect of *later treaties*, a topic which has already come under prolonged examination by the Commission in connection with articles 41 and 65." *Id.* at 62 (emphasis added). Thus, to the Special Rapporteur, the phrase "later agreement" in the draft was equivalent to a "later treaty." Consequently, the fact that the final version of Article 31(3)(a) does not include the term "treaties" in no way suggests that it refers to anything other than a formal agreement, equivalent to a treaty. *See* 07/13/01 Tr. at 410:2-5 (Mr. Veeder inquiring into the significance of Article 31(3)(a)'s omission of the word "treaty").

Subsequent comments during deliberations by the ILC and the U.N. Conference on the Law of Treaties confirm that Article 31(3)(a) refers to a formal written exchange. For example, Sierra Leone's representative to the 1968 session of the U.N. Conference on the Law of Treaties observed that the ILC's commentary to what became Article 31(3)(a) indicated that the term subsequent agreement "meant an agreement in writing." United Nations Conference of the Law of Treaties, First Session, *Summary Records of the Plenary Meetings of the Committee of the Whole* at 174. He therefore suggested that "[p]erhaps it would be better to say so explicitly in the text of the article." *Id.* There being no confusion regarding what the term "subsequent agreement" meant, however, the Conference apparently found further explanation unnecessary.

Although what became Article 31 was the subject of extensive debate, the meaning of the term "subsequent agreement" was never questioned. *See* U.N. Conf., *Summary Records of First Session* at 166-85, 441-42. The only suggestion that something less than a formal, written exchange might satisfy Article 31(3)(a) came from Germany's representative to the Conference's 1969 meeting, which occurred after the debate had ended, and after the text of Article 31(3)(a) had been approved. Notably, although Germany commented on Article 31 extensively during the earlier 1968 debates, it never suggested then that the term "subsequent agreement" might encompass something less than the formal, written agreement originally intended. *See id.*, First Session, at 172-73.

In fact, a State Department publication released the year after the Vienna Convention was adopted strongly implies that litigation submissions are *not* an appropriate vehicle for reaching a subsequent agreement:

. . . it may be said that, in so far as treaties in their international aspect are concerned, they may be authoritatively interpreted by the parties themselves through mutual agreement, either directly and *through the ordinary channels of international relations*, or

indirectly as the result of recourse to good offices, mediation, or conciliation. Or they may be interpreted by an international organ or agency, permanent or ad hoc, to whose decision and interpretation the parties to the dispute agree to submit.<sup>5</sup>

Majorie M. Whiteman, Assistant Legal Adviser, Department of State, 14 *Digest of International Law* 361 (1970) (quoting Harvard Research in International Law, *Draft Convention on the Law of Treaties*, Comment 29, Am. J. Int'l L. Supp. (1935) 975-76) (emphasis added).

Similarly, in this very case, the United States went out of its way during the hearing to discount the weight that should be attached to Mexico's *prior* litigation submissions:

And finally, Methanex attempted to make much yesterday of some isolated statements in Mexico's counter-memorials in two early NAFTA cases. I think the tribunal will find, on reviewing those statements in context that they merely represent the effort that any good litigant would make to meet the case against it under any conceivable interpretation of a provision at a merits hearing.

07/12/01 Tr. at 237:11-18. Under the United States' own standard, then, the Parties' litigation submissions here should be accorded no greater weight, and certainly should not be the basis of a formal agreement.

Additionally, relevant case law shows that a subsequent interpretive agreement is normally a formal document. In the *Case Concerning the Territorial Dispute (Libya/Chad)*, Libya argued that its 1955 Treaty with France (Chad's former colonial ruler) did not fix the border between Libya and what later became Chad. 1994 I.C.J. 6, ¶ 44. Finding to the contrary, the International Court of Justice supported its decision by observing that:

No subsequent agreement, either between France and Libya, or between Chad and Libya, has called in question the frontier in this region deriving from the 1955 Treaty. On the contrary, if one considers *treaties* subsequent to the entry into force of the 1955 Treaty, there is support for the proposition that after 1955, the

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<sup>5</sup> This last sentence presages the interpretive role of the NAFTA Free Trade Commission.

existence of a determined frontier was accepted and acted upon by the Parties.

*Id.* ¶ 66 (emphasis added). The court then went on to examine the contents and implications of four formal treaties and accords concluded between the parties after 1955. *Id.* ¶ 67.

Similarly, WTO Panels that have considered “subsequent agreements” within the context of Article 31(3)(a) have been concerned with subsequent treaties, including NAFTA itself. *See Canada-Term of Patent Protection*, WT/DS170/R, 2000 WL 631059, at \*32 n.49 (May 5, 2000) (Panel Report) (rejecting implication that NAFTA had any relevance to a dispute between Canada and the United States over the interpretation of a TRIPS agreement); *see also United States-Restrictions on Imports of Tuna*, DS29/R, 1994 WL 907620, at \*57 ¶ 5.19 (June 16, 1994) (Panel Report) (unadopted) (finding that certain agreements entered into by some GATT Members were not “subsequent agreements” within the meaning of Article 31(3)(a) because, *inter alia*, they were not signed by all GATT Members).

The case of *Société Ruegger et Boutet v Société Weber et Howard* presents a rare example where something other than a single document was construed as an agreement. In that case, the French Civil Tribunal of the Seine was dealing with “an interpretation recorded by exchange of notes between the French Minister of Foreign Affairs and the British Ambassador” when it stated: “It follows from this exchange of notes that there is a bilateral convention interpretative of the Treaty of 1882 which is binding on the courts of both countries.” 1933-34, Case No. 179; 32 *Revue critique de droit international* (1937) 86-88 (as quoted in 5 Green H. Hackworth, *Digest of International Law* 269 (1943)). Although the case does not involve a single document or formal treaty, it nonetheless shows the need for a formal diplomatic exchange, at the ministerial level, to create a binding legal instrument.

Indeed, Methanex has not been able to locate a single case in which something less than a treaty or formal diplomatic exchange was found to be a subsequent agreement within the meaning of Article 31(3)(a). And all of the cases that Methanex has reviewed involved a subsequent treaty or other formal diplomatic exchange.

Finally, practical considerations demand a formal document whose contents can be understood and made generally known. As demonstrated above, the pervasive inconsistencies between and ambiguity of the Parties' positions amply demonstrate why only a formal, negotiated agreement is within the scope of Article 31(3)(a). The numerous distinctions among the words the Parties employed in those separate submissions make it impossible to discern the actual terms of the supposed agreement. Had the Parties instead signed a single treaty of interpretation, or exchanged diplomatic protocols formally accepting a single, unambiguous interpretation of a particular term or provision, the scope of their actual agreement would not be in doubt. As it is, the separate submissions are simply too divergent to create any meaningful substantive content.

Similarly, what is the precedential value of a supposed agreement based on three or four overlapping litigation submissions? If it is meant only to influence this proceeding (by restricting Methanex's rights), it is obviously improper. *See* Joint Comments ¶¶ 9 & 14. And if it is meant to be binding on all Parties and NAFTA investors, how is the content of such an agreement to be communicated to such investors and the future Tribunals called upon to adjudicate their rights?

VCLT Article 31(3)(a) implies the existence of a written, formal, clear document or documents that is publicly known and available to all interested parties. The oral agreement of the United States and Mexico as to their litigation submissions satisfies none of those criteria.

**C. Even If There Were An Agreement, The Tribunal Should Not Apply It Here**

Even if the Parties' submissions could be construed as an agreement, there are many reasons why this Tribunal should not apply it to this proceeding.

**1. The Supposed Agreement Has No Retroactive Effect**

First, international agreements are normally prospective only, as the Vienna Convention expressly states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Vienna Convention on the Law of Treaties, art. 28; *see also* Joint Comments ¶¶ 8-10. None of the Parties has indicated that the supposed agreement has retroactive effect.

Further, even if the Parties had agreed to retroactivity, that would be manifestly unjust here. Mexico's own submission leaves no room to doubt that the Parties' current "interpretations" do not establish the Parties' original intent, but instead are "policy-based positions" that reflect their *current* reassessment of the obligations they created in Chapter Eleven:

Each Party seeks to ensure that its investors receive an appropriate level of protection in each of the other Parties as intended by Chapter Eleven. *Each necessarily balances its interests (the protection of its investors vs. the level of its exposure to claims) when formulating its position on interpretive issues.*

Mexico's May 15, 2001 Submission ¶¶ 3, 4 (emphasis added); *see also* Joint Comments ¶ 10.

As a matter of procedural due process, there is no reason why the Parties should be permitted to use this arbitration to "rebalance" the protections embedded in Chapter 11 by retroactively restricting the rights of the very persons meant to receive such protection. *See* Joint Comments ¶¶ 9-13.

## 2. The Parties May Not Amend NAFTA Through Extra-Constitutional Means

Even if the Parties' submissions were viewed as constituting an actual agreement, the changes to NAFTA are so drastic that they constitute an impermissible amendment, not an interpretation. While the line between subsequent interpretation and subsequent modification is not always easy to discern, one commentator has observed:

It is also possible that the meaning and effect originally attached by the parties to a particular provision proves, in practice, to be unworkable or inconvenient, or the parties change their minds, and an alternative operation of the provision is tacitly substituted.

Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989* (Part Three), 1991 Brit. Y.B. Int'l L. 52.

It should be apparent to the Tribunal that the Parties have changed their mind since 1994, and now seek to restrict the scope of Chapter 11 by, in effect, inserting new text into unambiguous sections of the agreement. For example, the Parties seek to insert new language into Article 1101, such as (depending on which Party's language is selected), "measures *with a legally significant connection*" (U.S. version); or "measures *with a significant connection*" (Canadian version); or "measures *with a direct nexus*" (Mexican version).

The most egregious example of an amendment is Mexico's and the United States' agreement that intangible property does not include goodwill. *Every definition of intangible properly proffered to the Tribunal expressly includes goodwill.* The Parties have not established *any* ambiguity or uncertainty of any sort as to the ordinary meaning of "intangible property." Consequently, the proposed "interpretation" can only be construed as an attempt to modify Article 1139(g) so that it reads "Investment means . . . other property, tangible or intangible (*except for goodwill*)." Methanex submits that adding such restrictions would amend, not merely interpret, Article 1101.

But the Parties may no more amend NAFTA through subsequent litigation agreements than through subsequent litigation practices. In the United States, and presumably in Canada and Mexico as well, there are constitutionally-mandated procedures for amending a treaty, and the Parties' independent submissions in these proceedings fall far short of those requirements. NAFTA Article 2202 explicitly recognizes the need to adhere to these procedures (emphasis added):

1. The Parties may agree on any modification of or addition to this Agreement.
2. When so agreed, *and approved in accordance with the applicable legal procedures of each Party*, a modification or addition shall constitute an integral part of this Agreement.

In the United States, the requirements for amending a treaty or international agreement are the same as for enacting it in the first place. Thus, the "President's power to terminate an international agreement does not imply authority to modify an agreement or to conclude a new one in its place." *Restatement*, §339, cmt. a. In other words:

The President cannot make an altogether new treaty and dispense with the requirement of Senate advice and consent by calling that treaty an 'interpretation' of an earlier one. Nor can he amend an earlier treaty and escape the requirement of Senate approval (to what is in reality a new treaty) by calling the amendment an 'interpretation.' The President's own semantic denomination of his act cannot control what procedure constitutionally is required.

Michael J. Glennon, *Symposium on Parliamentary Participation in the Making and Operation of Treaties: United States*, 67 Chi.-Kent L. Rev. 533, 553 nn. 108-9 (1991).

Thus, if the supposed agreement is in reality an amendment, this Tribunal should not consider it at all.

### 3. The Tribunal Should Take Into Account the Rights and Interests of Treaty Beneficiaries

NAFTA Chapter 11 was enacted to protect NAFTA investors and their investments, and the Tribunal should consider investors' rights in construing NAFTA. As the Joint Comments note, ¶¶ 11-13, where a treaty confers rights on individuals, and induces individual action based on the legitimate expectation that those rights will be respected, any ruling that the Parties may informally and retroactively narrow those rights would seriously undermine not only the objects of NAFTA itself, but also international faith in the rule of law. Indeed, as the Joint Comments further note, international tribunals such as the European Court of Justice are increasingly taking the rights of protected persons into account. *Id.* ¶ 11.

Mexico's own submission implicitly recognizes that where a Party, through a subsequent interpretation, seeks to *limit* its obligations, that interpretation is entitled to less weight before a Tribunal:

Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value *when they contain recognition by a party of its own obligations under an instrument.*

Mexico's May 15, 2001 Submission ¶ 2 (quoting *Advisory Opinion on the Status of South West Africa*, 1950 I.C.J. Reports 129, 135) (emphasis added). Under Mexico's own standard, an interpretation limiting investors' rights has little probative value.

The Parties' purpose in submitting these carefully-orchestrated submissions is clear enough: to cut back the investor protections contained in NAFTA's text. Neither international law, nor concepts of procedural process, fairness, and equity, allow this Tribunal to adopt such retroactive restrictions.

## II. THE *OIL PLATFORMS* CASE

At the conclusion of the hearing on jurisdiction and admissibility, the Tribunal requested that the parties to the dispute provide their observations on the decision of the International Court of Justice decision in *Islamic Republic of Iran v. United States* (1996 I.C.J. 803) (“*Oil Platforms*”) concerning the appropriate test for jurisdictional objections. It specifically asked that the parties give particular attention to the separate opinions of Judge Higgins and Judge Shahabuddeen. 7/13/01 Tr. at 549:2-9. As described below, Methanex’s claims in this case clearly meet the jurisdictional thresholds set forth in *Oil Platforms*.

### 1. The ICJ’s Jurisdictional Decision in *Oil Platforms* Was Animated By Treaty Constructions Consistent With The Treaty’s Purpose

In evaluating the objections of the United States, the ICJ made it clear that the object and purpose of the treaty at issue is one of the most important considerations in deciding preliminary jurisdictional challenges.

The Court cannot lose sight of the fact that Article I states in general terms that there shall be firm and enduring peace and sincere friendship between the Parties. The spirit and intent set out in this Article *animate and give meaning to the entire Treaty and must, in case of doubt, incline the Court to the construction which seems more in consonance with its overall objective* of achieving friendly relations over the entire range of activities covered by the Treaty.

*Oil Platforms*, 1996 I.C.J. ¶ 52 (emphasis added).

[B]y incorporating into the body of the Treaty the form of words used in Article I, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations and that such a development would in turn reinforce that peace and that friendship. It follows that *Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied.*

*Id.* at ¶ 28 (emphasis added). Throughout its review of the specific provisions of the Iran-U.S. treaty, the ICJ consistently returned to the treaty’s stated objectives as the cornerstone for its interpretations.

The ICJ also rejected the United States’ attempts to create exclusions from the treaty’s coverage if the exclusions were unsupported by treaty language. For example, the Court rejected the United States’ argument that acts of force were outside the scope of the treaty, reasoning that the treaty did not contain any provision expressly excluding any matters from the Court’s jurisdiction. Specifically, it found that “[a] violation of the rights . . . under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision . . .” *Oil Platforms* at ¶ 21.

The ICJ rejected the United States’ attempts to deviate from the ordinary meaning of treaty terms. The ICJ noted that “there is nothing to indicate that the parties to the treaty intended to use the word ‘commerce’ in any sense different from that which it generally bears.” *Id.* at ¶ 45. To determine the “ordinary” meaning of “commerce,” the ICJ reviewed the definitions provided by the *Oxford English Dictionary*, *Black’s Law Dictionary*, and the *Dictionnaire de la terminologie du droit international*. *Id.*

The ICJ uniformly rejected the restrictive interpretations of the treaty terms advocated by the United States. Thus, it rejected the United States’ argument that, based on its context, the treaty term “commerce” should be restricted to maritime commerce, instead finding that “having regard to other indications in the Treaty of” (*id.* at ¶ 41) its objective and purpose, the treaty was properly interpreted as “relating to trade and commerce in general, and not one restricted purely to maritime commerce.” *Id.* at ¶ 40.

Similarly, the ICJ rejected the United States' argument that "commerce" should be restricted to the acts of purchasing or selling. The ICJ noted that the restrictive interpretation asserted by the United States would "not cover the antecedent activities which are essential to maintain commerce as, for example, the procurement of goods with a view to using them for commerce." *Id.* at ¶ 45. The ICJ concluded that "[t]he word 'commerce' is not restricted in ordinary usage to the mere act of purchase and sale" and noted that "whether the word 'commerce' is taken in its ordinary sense or in its legal meaning, at the domestic or international level, it has a broader meaning than the mere reference to purchase and sale." *Id.*<sup>6</sup>

This Tribunal should adopt the same approaches here. NAFTA's text makes clear that the relevant treaty objectives and purposes are to: "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties" (NAFTA art. 102(1)(a)); "increase substantially investment opportunities in the territories of the Parties" (NAFTA art. 102(1)(c)); "create effective procedures for . . . the resolution of disputes" NAFTA art. 102(1)(e); and "establish[] a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal." NAFTA art. 1115.

In considering the United States' jurisdictional challenges, this Tribunal should construe the relevant treaty provisions and Methanex's alleged facts in a manner consistent with

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<sup>6</sup> The ICJ's approach was consistent with that of other NAFTA tribunals. For example, in *Loewen v. United States*, the tribunal held that: "Guided by the[] objectives and principles [of NAFTA], we do not accept the Respondent's submission that NAFTA is to be understood in accordance with the principle that treaties are to be interpreted in deference to the sovereignty of states;" and that "The text, context and purpose of Chapter Eleven combine to support a *liberal rather than a restricted interpretation* of the words 'measures adopted or maintained by a Party', that is, *an interpretation which provides protection and security for the foreign investor and its investment* [citations omitted]." Jurisdictional Decision, January 5, 2001 ¶ 51, 53 (emphases added).

NAFTA's stated purposes of protecting investments and providing effective dispute resolution procedures. Likewise, the Tribunal should reject the numerous efforts by the United States to read into the text of NAFTA restrictions that the ordinary meaning of the treaty's terms will not bear.

## **2. Construction Of Treaty Terms**

In *Oil Platforms*, the ICJ implicitly found that even at the jurisdictional stage it was necessary for the Court to issue definitive interpretations of disputed treaty provisions. Thus, the Court reached apparently final conclusions on whether the alleged violations “do or do not fall within the provisions of the Treaty.” *Id.* at ¶ 16. For example, the Court fully considered the United States' argument for “a more restrictive interpretation of the word ‘commerce’ . . . as being confined to maritime commerce” (*id.* at ¶ 40), examining other indications of the parties' intention, the breadth of the provisional agreement which the treaty had replaced, and the range of other activities that the treaty dealt with. *Id.* at ¶ 41. On the basis of this examination, the ICJ ruled that the treaty “is thus a Treaty relating to trade and commerce in general, and not one restricted purely to maritime commerce.” *Id.*

In their concurring opinions, Judges Higgins and Shahabuddeen sought to elaborate on the methodological approach used by the ICJ. In her Separate Opinion, Judge Higgins concurred in what she characterized as the Court's “definitive approach.” *See Oil Platforms*, 1996 I.C.J. at ¶ 30 (Sep. Op. Higgins, J.). According to Judge Higgins, the definitive approach provides a better solution to the “methodological problem[] at the heart of the present case,” *i.e.*, the struggle between the idea that it is enough for the Court to find provisionally that the case for jurisdiction has been made, and the alternative view that the Court must have grounds sufficient to determine definitively at the jurisdictional phase that it has jurisdiction. *Id.* at ¶ 11 (Sep. Op. Higgins, J.).

In contrast, Judge Shahabuddeen, after analyzing relevant ICJ decisions and equitable principles inherent in the jurisdictional challenges, concluded that the Court was not required to reach a definitive interpretation of treaty provisions at the jurisdictional phase. Instead, Judge Shahabuddeen urged a “relativity test” which focuses the jurisdictional decision “on the relationship between the claim and the treaty on which the claim is sought to be based.” *Oil Platforms*, 1996 I.C.J. at \*824 (Sep. Op. Shahabuddeen, J.). Under the relativity test, the Tribunal would only determine whether “the arguments advanced by the [claimant] . . . in respect of the treaty provisions on which the . . . claim is said to be based, [are] of a *sufficiently plausible character* to warrant a conclusion that the claim is based on the Treaty.” *Id.* (emphasis added) (citing *Ambatielos*, Merits, Judgment (I.C.J. Reports 1953, at 18)); or whether “the interpretation given by the [claimant] . . . to any of the [treaty] provisions relied upon appears to be *one of the possible interpretations that may be placed upon it*, though not necessarily the correct one . . .” *Id.* at \*825 (Sep. Op. Shahabuddeen, J.) (emphasis added); or whether “it is made to appear that the [claimant] . . . is relying upon *an arguable construction of the Treaty*, that is to say, a construction which can be defended whether or not it ultimately prevails . . .” *Id.* (emphasis added).

Judge Shahabuddeen further concluded that the ICJ has actually adopted the relativity test for its jurisdictional determinations, citing *Interhandel*, Judgment, 1959 I.C.J. 24 and *Military and Paramilitary Activities* (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 427. In describing the level of examination that the Tribunal should give to the treaty texts when considering jurisdictional challenges, Judge Shahabuddeen noted that in the *Military and Paramilitary Activities* case, the ICJ “gave [the treaty texts] *limited consideration - almost restricted to inspection* - for the purpose of determining whether there was ‘a reasonable

connection' between them and the claims submitted to the Court.” *Oil Platforms* 1996 I.C.J. at \*827 (Sep. Op. Shahabuddeen, J.) (emphasis added).

Judge Shahabuddeen did accept that the Court must make a definitive decision as to its jurisdiction: “the Court has to decide definitively, and not provisionally, that the particular dispute is ‘within the category of disputes for which the [Respondent] has accepted the jurisdiction of the Court.’” *Id.* at \*831 (quoting *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924 P.C.I.J., (Ser. A) No. 2, at 29). But he noted that a distinction should be drawn “between the making of a definitive decision as to whether the dispute falls within the stipulated category of disputes and the *criterion on which the decision is made.*” *Oil Platforms* at \*831 (Sep. Op. Shahabuddeen, J.) (emphasis added).

In contrast to Judge Higgins, Judge Shahabuddeen did not appear to agree that the Court, at the jurisdictional stage, must or should make definitive decisions as to the construction or scope of specific treaty provisions. While Judge Higgins argued that a definitive interpretation of the treaty should be compared to the factual claims, Judge Shahabuddeen favored a less vigorous comparison based on a more limited examination of the treaty’s text.

Of the two contrasting approaches, Methanex considers Judge Shahabuddeen’s more appropriate. As he noted, there is some risk of procedural unfairness — in particular, of prejudging claims and defenses — if the Tribunal makes any definitive interpretation of a treaty provision before it has had the opportunity to consider the merits of the parties’ arguments. Accordingly, in construing NAFTA provisions at the jurisdictional stage, Methanex urges the Tribunal to “merely [ask] whether the construction of the Treaty on which the Application relied was an arguable one, even if it might eventually turn out to be incorrect.” *Id.* at \*840-41 (Sep. Op. Shahabuddeen, J.). The Tribunal should also note Judge Shahabuddeen’s conclusion that “in

the nature of things, it is *only in exceptional and clear cases* that the Court may find that an applicant's assertion that the instrument relied on gave the right claimed lacks 'some serious juridical basis.'" *Id.* at \*831-32 (emphasis added). In other words, "[i]f the Court has to wrestle its way to the conclusion that a claim lacks a serious juridical basis, that is scarcely a case for exclusion." *Id.* at \*832.

However, it is ultimately irrelevant whether this Tribunal follows the "definitive approach" ascribed to the ICJ by Judge Higgins, or the "relativity test" described by Judge Shahabuddeen, for Methanex meets either standard. If the Tribunal adopts the "definitive" approach of the ICJ and Judge Higgins in *Oil Platforms*, and if it gives NAFTA's terms their ordinary meaning, Methanex's factual allegations will readily sustain jurisdiction. Since Methanex satisfies this more rigorous standard, it is unnecessary for the Tribunal to consider the less demanding "relativity test" described by Judge Shahabuddeen.

### **3. The Standard For Analyzing a Claimant's Specific Factual Allegations**

In *Oil Platforms* the ICJ, Judge Higgins, and Judge Shahabuddeen all took an approach that was, in effect, quite deferential to the factual allegations made by a Claimant in its claim and its subsequent filings. The ICJ's judgment only required that the facts alleged by Iran be "*capable of having such an effect*" of violating the obligations contained in the treaty. *Oil Platforms, supra* at ¶ 51 (emphasis added). "[T]he *possibility must be entertained* that [the claimant's rights] could actually be impeded as a result of acts [of the state]. . ." *Id.* at ¶ 50.

Judge Higgins took the same approach to factual allegations. "[T]he only way in which . . . it can be determined whether the claims . . . are sufficiently plausibly based upon the . . . Treaty is to *accept pro tem the facts as alleged . . . to be true* and [in] that light to interpret [the treaty] for jurisdictional purposes - that is to say, to see if on the basis of [the] claims of fact

*there could occur* a violation of one or more of them.” *Id.* at ¶ 32 (Sep. Op. Higgins, J.) (emphasis added). She explained further that the “Court should . . . see if, on the facts as alleged [the] actions complained of *might violate* the Treaty articles.” *Id.* at ¶ 33 (Sep. Op. Higgins, J.) (emphasis added).

Similarly, Judge Shahabuddeen would require only that the complaint “indicate[] some genuine relationship between the complaint and the provisions invoked . . .” *Id.* at \*825 (Sep. Op. Shahabuddeen, J.) (*citing Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion (1956 I.C.J. Reports, 77, 89)).

Methanex easily satisfies this common standard. There can be no serious doubt that if all its factual allegations are accepted as true, the United States “might” have or “could” have breached its obligations concerning “national treatment” under Article 1102, fair and equitable treatment under Article 1105, and expropriation under Article 1110.

### III. CONCLUSION

For all the reasons set forth above and in the course of the proceedings, Methanex respectfully submits that this Tribunal has jurisdiction to resolve this dispute.

July 20, 2001

Respectfully submitted,

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Christopher F. Dugan

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James A. Wilderotter

Joseph J. Migas  
Nancy M. Kim  
Matthew S. Duchesne  
JONES, DAY, REAVIS & POGUE  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
Tel: (202) 879-3939  
Fax: (202) 626-1700

*Attorneys for Claimant  
Methanex Corporation*

**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.**

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**POST-HEARING SUBMISSION OF CLAIMANT  
METHANEX CORPORATION**

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Christopher F. Dugan  
James A. Wilderotter  
Joseph J. Migas  
Nancy M. Kim  
Matthew S. Duchesne  
JONES, DAY, REAVIS & POGUE  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
Tel: (202) 879-3939  
Fax: (202) 626-1700

*Attorneys for Claimant  
Methanex Corporation*

July 20, 2001

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