

In accordance with the Tribunal’s directions, this Reply addresses the post-hearing submission filed by the United States on July 20, 2001 on the two issues specified by the Tribunal: (1) whether the litigation submissions of the NAFTA State Parties (“Parties”) in this case constitute a subsequent interpretive agreement under Article 31(3)(a) of the Vienna Convention on the Law of Treaties (“VCLT”); and (2) the guidance this Tribunal may draw from the decision of the International Court of Justice in the *Oil Platforms* case.

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

### **A. The United States Has Not Established The Existence Of A “Subsequent Agreement” Between The Parties**

As Methanex demonstrated in its Post-Hearing Submission (“Methanex’s July 20, 2001 Sub.”), there is no express “subsequent agreement” between the Parties, nor can this Tribunal infer any legally meaningful agreement from their separate and inconsistent submissions in these proceedings. None of the Parties raised the issue of an Article 31(3)(a) agreement in their separate submissions to this Tribunal—like the United States and Mexico, Canada relied exclusively on VCLT Article 31(3)(b). *See* Canada’s May 2, 2001 Submission ¶ 8. Although the United States has now seized upon the Tribunal’s question concerning Article 31(3)(a) as a life raft for a new “subsequent agreement” argument, and Mexico’s representative to the jurisdictional hearing followed suit, Canada has not. While Canadian officials have now had nearly two weeks to confer on and consider the issue, Canada still has not made any claim that its purely advisory submission to this Tribunal was intended to or had the effect of creating a “subsequent agreement” within the meaning of Article 31(3)(a). That fact alone dooms the United States’ claim that a “subsequent agreement” exists between the Parties.<sup>1</sup>

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<sup>1</sup> Even if Canada were to now somehow join the “interpretation agreement” claimed by the United States, that action, for the reasons described *infra*, would still not create an agreement within the scope of VCLT Article

**B. Even If, Contrary To The Case Here, There Were An Agreement, It Would Not Be Binding On The Tribunal In This Proceeding**

The United States concedes that if a “subsequent agreement” existed between the Parties, it would not be binding on this Tribunal, for Article 31(3)(a) requires only that a subsequent agreement “shall be taken’ into account.” U.S. July 20, 2001 Sub. at 3. Moreover, Methanex believes that the Tribunal is obligated to consider the arguments of *both* sides on this issue, but that hardly binds the Tribunal to accept an interpretation that does not comport with the plain meaning of NAFTA’s text, nor with its underlying policies and objectives. *See* Joint Comments of Sir Robert Jennings and Sir Ian Sinclair (submitted as part of Methanex’s July 20, 2001 Sub.).

**C. Article 31(3)(a)’s Drafting History Establishes That It Requires A Formal Agreement Executed By Properly Authorized Officials**

As Methanex has also demonstrated, Article 31(3)(a)’s drafting history establishes that the term “subsequent agreement” refers to a subsequent treaty or other formal diplomatic exchange between the treaty parties. It does not encompass independent, advisory submissions such as those created for this litigation. *See* Methanex’s July 20, 2001 Sub. at 2-4. As drafted, discussed, and adopted by the International Law Commission, the term “subsequent agreement” was intended to refer to a treaty or other formal exchange. *See id.* at 10. And contrary to the United States’ assertion, representatives to the First Session of the United Nations Conference, which debated and approved the final text of Article 31(3)(a), similarly understood the term to mean a written exchange. *See id.* at 11-12. Moreover, Methanex has not been able to identify a single decision in which a court or other tribunal held something less than a treaty or other formal, diplomatic exchange between properly authorized government representatives to be a

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(continued...)

31(3)(a). Such a belated action would only underscore the different positions (or non-positions) heretofore taken by Canada in this very case.

“subsequent agreement” within the meaning of Article 31(3)(a). Tellingly, the United States fails to identify any such authority in its own Submission.

Nor do the United States’ secondary sources support its position.<sup>2</sup> For instance, the United States cites Anthony Aust, *Modern Treaty Law and Practice* (2000), for the proposition “that ‘agreement’ within the Article need not be in any particular form.” U.S. July 20, 2001 Sub. at 4 n.5. But Aust states only that the agreement can take “various” forms, not “any” form. *See* Aust at 191.

The United States’ argument is largely irrelevant in the circumstances presented here, for it still has not shown that its litigators have the necessary authority. It is an elementary tenet of international law that the validity of an international agreement depends on the authority of those who purport to enter into it. *See* Methanex’s July 20, 2001 Sub. at 3-4. Nothing in the secondary sources cited by the United States suggests that an insufficiently-authorized agreement—written or oral—would satisfy Article 31(3)(a). Indeed, the United States’ authority Aust provides four specific examples of “subsequent agreements,” each of which involved formal documents prepared or approved by heads of state or other “fully authorized” diplomatic officials. *See* Aust at 192-93.<sup>3</sup> Even assuming that heads of state or foreign ministers could

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<sup>2</sup> At the jurisdictional hearing, the United States cited Mark Villiger’s *Customary International Law and Treaties* (1985) as supporting its argument that an Article 31(3)(a) “subsequent agreement” may take any form. *See* 7/13/01 Tr. at 508:10-16. However, the passage that the United States quoted appeared in the first edition of Villiger’s book, not the second as the United States had indicated at the hearing. Additionally, it is not clear that Villiger meant the quoted statement to apply to Article 31(3)(a) as well as to Article 31(2)(a), about which he was writing exclusively at the time. In any event, Villiger appears to have omitted the statement entirely from the second “fully revised” edition of his book (1997), which may explain why he is not cited in the United States’ July 20, 2001 Submission.

<sup>3</sup> Importantly, Aust also notes that one of the examples effectively changed the operation of the treaty to alleviate an undesirable administrative backlog. Aust at 192-93. The others “amounted more to modifications or amendments to the treaties.” *Id.* at 193. Aust ends his discussion of Article 31(3)(a) with the following caution:

The distinction between interpretation and amendment is not always easy to draw. Problems could be caused if such means are used for a purpose which is safer done by a formal amendment to the treaty.

establish an authoritative “subsequent agreement” through oral declarations, it does not follow that trial lawyers or other staff personnel of a government party have similar authority.

The United States does not dispute this fundamental principle and, in fact, concedes that under U.S. law, it is the President who has the authority to interpret an international agreement.<sup>4</sup> *See* U.S. July 20, 2001 Sub. at 6 n.9. Yet none of the governments’ employees engaged in this case have proffered the “full powers” or any other evidence necessary to establish their authority to enter binding agreements on important issues of international law. *See* Methanex’s July 20, 2001 Sub. at 3-4. Consequently, even if the United States’ “subsequent agreement” claim did not fail for lack of an actual agreement, it would fail for lack of sufficient authority.<sup>5</sup>

**D. The United States Fundamentally Misunderstands The Nature Of Article 1128 And Similar NAFTA Provisions**

As Methanex demonstrated in its July 20 submission, Article 1128 simply establishes a mechanism by which a non-disputing Party may elect to submit its individual views to a Chapter Eleven Tribunal. *See* Methanex’s July 20, 2001 Sub. at 5; *see also* Joint Comments ¶¶ 1, 4. The United States’ suggestion that such submissions can establish authoritative interpretations is belied by its own analysis. For instance, the United States correctly notes that Article 2001(2)(c) creates a mechanism by which the NAFTA Parties, acting jointly in the form of the tripartite Free Trade Commission, can “resolve disputes that may arise concerning [NAFTA’s]

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(continued...)

*Id.* As Methanex discusses *infra*, the United States in this case seeks to amend NAFTA, not interpret it.

<sup>4</sup> As Methanex set forth in its July 20, 2001 submission, primary responsibility for negotiating and interpreting trade agreements has been delegated to the United States Trade Representative, not to the Department of State. *See* Methanex’s July 20, 2001 Sub. at 3-4.

<sup>5</sup> Methanex does not contest the authority of the State Department attorneys to advance litigating positions and similar arguments on behalf of their client, the respondent United States. But it does contend that such litigating positions, which are tailored to the facts and circumstances of a particular case and which reflect both the adversarial nature of litigation and the professional obligations of lawyer-advocates in the U.S. justice system, cannot somehow be transformed, *mirabile dictu*, into an “agreement” as that term was contemplated and used by the drafters of the Vienna Convention.

interpretation or application.” *See* U.S. July 20, 2001 Sub. at 5. Similarly, “Article 1415 provides a mechanism whereby the Financial Services Committee, *comprised of members of each of the Parties*, may *decide* an issue when an investor files a claim under Chapter Eleven and the NAFTA Party invokes Article 1410.” *Id.* at 5-6. (emphasis added). In sharp contrast, “[l]ike Article 1128, Article 2013 provides that a NAFTA Party that is not a disputing Party may make *submissions* to a panel established under Chapter Twenty to settle disputes.” *Id.* at 5 (emphasis added). Obviously, the power of formally-constituted NAFTA entities such as the Free Trade Commission and the Financial Services Committee to act jointly to “resolve disputes” or “decide an issue” is very different from the right of a NAFTA Party to make an individual “submission.” The United States’ attempt to conflate the two demonstrates a fundamental misconstruction of the NAFTA provisions at issue.

**E. Even If There Were An Agreement, It Would Be An Agreement To Amend, Not To Interpret NAFTA**

The United States concedes that an interpretation must “merely clarif[y] what the provision always meant.” U.S. July 20, 2001 Sub. at 5. But, as Mexico candidly admits, the positions asserted in the Parties’ separate submissions to this Tribunal reflect not their original intent, but rather their *current* “policy-based positions” regarding the degree to which they remain committed to protecting their own nationals when doing so leaves them equally “expos[ed] to claims.” *See* Mexico’s May 15, 2001 Submission ¶¶ 3-4. Nor is it any secret that “the Canadian government is now leading the charge towards the adoption of an amendment to or reform of Chapter 11.” Jason L. Gudofsky, *Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An Environmental Case Study*, 2 *Nw. J. Int’l L. & Bus.* 243, 304 (2000).

As Methanex has repeatedly demonstrated, each of the United States' proffered "interpretations" require either inserting words into the text of NAFTA where they currently cannot be found, or deleting words that are currently there. Thus, the United States offers the following interpretations (deletions ~~stricken~~, additions in *italics*):

- Article 1101(1): This Chapter applies to measures adopted or maintained by a Party ~~relating~~ *with a significant legal connection* to: (a) investors of another Party . . .
- Article 1105(1): *The International Minimum Standard of Treatment Is the Only Protection Accorded to NAFTA Investors*
  1. Each Party shall accord to investments of investors of another Party treatment *only* in accordance with *customary* international law, ~~including~~ *which does not require* fair and equitable treatment, and ~~full protection and security~~ *which requires only reasonable police protection and security against acts of a criminal nature that physically invade an alien's person or property.*
- Article 1116: An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation [if] the investor has incurred loss or damage by reason of, ~~or arising out of,~~ that breach.
- Article 1139: For purposes of this Chapter: . . . investment means . . . other property, tangible or intangible (*except for goodwill*) . . .

If the Parties now wish to narrow their obligations under Chapter Eleven by inserting new words into its text, or deleting the language that is already there, NAFTA itself requires them to do so through their respective, constitutionally-mandated procedures for amending a treaty.

#### **F. Even If There Were A "Subsequent Agreement," It Would Not Have Retroactive Effect**

The United States claims that "[c]ontrary to Methanex's suggestion, the general rule is that interpretations of a treaty provision - whether by the treaty parties or by an international tribunal - are retroactive in effect, since an interpretation does not change the content of a provision, it merely clarifies what the provision always meant." U.S. July 20, 2001 Sub. at 4-5. However, the VCLT does not recognize any such "general rule." *See* Methanex's July 20, 2001

Sub. at 15; Joint Comments ¶¶ 8-10. In fact, the drafting history of Article 31(3)(a) is to the contrary. Thus, as was observed during the ILC’s discussion of what became Article 31(3)(a):

where [a subsequent agreement] was concerned, there might be some doubt concerning the value of subsequent treaties of interpretation and the possibility of their having retroactive effect. [The commentator] was accustomed to drafting protocols of interpretation which came into force on the day of the entry into force of the treaty of interpretation itself.

1966 *Y.B. of the Int’l Law Comm’n*, Volume I, part II at 192:91. Nor does the United States offer any authority to contradict this customary limitation on the power of treaty parties to apply subsequent interpretive agreements retroactively. Instead, it merely cites to a recent decision by the International Court of Justice as supporting the very different proposition that interpretations by an international tribunal apply to the parties before it. *See* U.S. July 20, 2001 Sub. at 5 n.8 (citing *LaGrand (Germ. v. U.S.)*, 2001 I.C.J. \_\_ ¶¶ 99, 109-16).

If the United States seeks to invoke VCLT Article 31(3)(a), it must take the VCLT as it finds it, including Article 28, which provides that unless otherwise indicated, a treaty—and by implication, any “subsequent agreement” which would change in any way a treaty—does not have retroactive effect unless the parties otherwise indicate. The NAFTA Article 1128 submissions of Canada and Mexico, on their face, indicate no such retroactive intent.

Moreover, the logic of the VCLT’s Article 28 codifying the customary rule against retroactivity is particularly apparent where, as here, the Parties’ attempt to “merely clarify” the provisions at issue not only is at odds with their text, context, and plain meaning, but also narrows rights that have been guaranteed by these provisions. *See* Joint Comments ¶¶ 11-13. It would violate elementary concepts of fairness and due process if Parties were permitted to “interpret” away pre-existing rights that third parties reasonably relied upon.

## II. THE UNITED STATES MISCONSTRUES *OIL PLATFORMS* AND METHANEX'S POSITIONS

In its Post-Hearing Submission, the United States has either ignored or misapplied the holdings of *Oil Platforms*, and it has misconstrued Methanex's positions. The United States completely ignores the importance that the International Court of Justice in *Oil Platforms* and elsewhere plainly attaches to a treaty's "object and purpose" in interpreting a treaty's substantive provisions. U.S. July 20, 2001 Sub. at 10-12; *see* Methanex's July 20, 2001 Sub. at 19-21. The United States similarly ignores the ICJ's straightforward interpretation of treaty provisions based on the ordinary meaning of treaty terms and the explicit rejection of the unduly restrictive interpretation of terms offered in that case by the United States. Instead, the United States argues that this Tribunal should adopt the government's restrictive amendments to NAFTA and conclude that under the thus-revised terms of the agreement, the substantive provisions of NAFTA are irrelevant to Methanex's claims. U.S. July 20, 2001 Sub. at 7-8. As noted in Methanex's submission, there is simply no legal basis for doing so. *See* Methanex's July 20, 2001 Sub. at 20-21.

Contrary to the assertion of the United States (U.S. July 20, 2001 Sub. at 9, 18), Methanex does not agree that this Tribunal should issue a definitive interpretation of NAFTA's substantive provisions. Methanex's July 20, 2001 Sub. at 24-25. Rather, Methanex believes that this Tribunal should follow the analytical approach of the ICJ's more recent opinions, including the 1954 ICJ opinion in *Ambatielos* (U.S. v. U.K.), 1953 I.C.J. 10 (May 19), which did not make definitive interpretations of treaty provisions at the preliminary stage of the proceedings (*contra* U.S. July 20, 2001 Sub. at 15-16), rather than the 1924 decision of the Permanent Court of International Justice in *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (Ser. A) No. 2, as

advocated by Judge Higgins. U.S. July 20, 2001 Sub. at 12-14. Methanex considers Judge Shahabuddeen's approach preferable here. Methanex's July 20, 2001 Sub. at 23.

**A. Methanex's Factual Allegations Must Be Accepted As True**

Both Methanex and the United States agree that all of Methanex's factual allegations must be accepted as true at this preliminary stage. *See* U.S. July 20, 2001 Sub. at 7-8 (dismissal required "even assuming the truth of its factual allegations"). Thus, for example, the Tribunal must accept as true the allegation that Gov. Davis intended to benefit the U.S. ethanol industry, and to penalize foreign producers of methanol and MTBE. Amended Claim 7-10, 32-33, 61, 66; 7/11/01 Tr. at 30:3-31:6; 7/13/01 Tr. at 391:12-393:8, 435:18-437:21, 459:6-478:5; Methanex Rejoinder at 7-8, 25-30. As the U.S. itself admits, those allegations satisfy even the restrictive "relating to" standard advocated by the United States.

MR. BIRNBAUM: Okay. If the purpose of the measure is an intent to harm foreign-owned investors or investments on the basis of nationality, then the measure relates to the foreign-owned investor or investment.

7/13/01 Tr. at 531:8-15.

Similarly, the Tribunal must accept as true Methanex's assertions that it competes directly with the U.S. ethanol industry in much of the California market, and is thus in "like circumstances" with the U.S. ethanol industry. Amended Claim at 4-13, 42-47; Methanex Rejoinder at 1-5, 17-21. Such allegations easily satisfy the pleading requirements of Article 1102, and, at this stage the Tribunal cannot accept the competing U.S. argument that the relevant industry should, as a factual matter, be defined differently. The same is true for all of Methanex's other factual allegations. The parties agree that the Tribunal is required to accept all of Methanex's allegations as true, and, conversely, that it may not accept any of the United States' factual assertions or characterizations.

## **B. Methanex Has Alleged Numerous Likely Violations of NAFTA**

Despite agreeing that all of Methanex's factual allegations must be accepted as true, the United States devotes much of its discussion to its contention that Methanex has failed "*credibly to allege*" necessary elements of a claim.<sup>6</sup> E.g. U.S. July 20, 2001 Sub. at 9. Under international law, a claim that a treaty has been violated is "credible" if the material before a tribunal demonstrates that a violation is conceivable or possible. A credible allegation does not have to refute a respondent's contrary factual explanations. So long as the allegations are not "incredible," "frivolous," or "vexatious," a tribunal has jurisdiction.

In *Oil Platforms*, 1996 I.C.J. 803, the Court focuses on the *possibility* of a treaty violation:

*On the material now before the Court*, it is indeed not able to determine if and to what extent the [actions of the United States] had an effect upon [the claimant's trade]; it notes nonetheless that [the action of the United States] was *capable of having such an effect* and, consequently, of [violating the terms of the treaty]. It follows that [the] lawfulness [of the United States' actions] can be evaluated in relation to [the treaty].

*Id.* at 820 ¶ 51 (emphasis added). Inherent in the ICJ's holding is the conclusion that in addressing respondent's jurisdictional objections, the Court must first accept claimant's factual allegations as true, and then determine whether there is a conceivable violation. If so, jurisdiction exists.

In her separate opinion, Judge Higgins was even more direct in articulating the need to focus on the possibility of a violation, and to defer factual inquiries until the tribunal turns to the merits of the claim. "Only at the merits, after deployment of evidence, and possible defences [to alleged treaty violations]" (*id.* at 856 ¶ 33 (Sep. Op. Higgins, J.)) may the Court convert its

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<sup>6</sup> If the United States is arguing that Methanex's factual assertions are themselves not credible, that is clearly an issue that can only be resolved at the merits stage, as *Oil Platforms* makes abundantly clear.

conclusion that a violation of treaty obligations “could” occur into the final determination that a violation “would” occur. *Id.* Thus, Judge Higgins agreed that at the jurisdictional phase of the proceedings:

The 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.

1996 I.C.J. at 856 ¶ 32 (Sep. Op. Higgins, J.) (emphasis added). If, “on the facts as alleged [the] actions complained of *might violate* the Treaty articles” (*id.* at ¶ 33 (Sep. Op. Higgins, J.) (emphasis added)) a tribunal should proceed to the merits phase of the proceeding to “determine what exactly the facts are, whether as finally determined they do sustain a violation of [the treaty provisions] and if so, whether there is a defence to that violation . . . In short, it is at the merits that one sees ‘whether there really has been a breach.’” *Id.* at 857 ¶ 34 (Sep. Op. Higgins, J.) (internal citations omitted); *see also* U.S. July 20, 2001 Sub. at 14.

Judge Higgins’ deferral of factual questions to the merits phase is consistent with other ICJ opinions she discusses in her separate opinion. For example, in the separate concurring opinion of Judge Sir Robert Jennings in the case of *Military and Paramilitary Activities (Nicar. v. U.S.)*, Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 427, Judge Higgins notes that Judge Sir Roberts Jennings “treated compendiously the concepts of seeing that a [treaty’s] clause ‘covers’ alleged acts and *making good the allegations* relating to them. *Both ‘must await the proceedings on the merits.’”* 1996 I.C.J. at 853 ¶ 22 (Sep. Op. Higgins, J.) (emphasis added) (internal citation omitted).

Finally, Judge Shahabuddeen completes the *Oil Platforms* chorus in support of the conclusion that a Tribunal should consider whether there is a possibility of treaty violation, and that all questions going to the claimant’s factual allegations must await consideration of the

merits of a claim. Thus, he concluded that “for jurisdictional purposes, the Court has to proceed on the footing that the Applicant is correct in its allegations as to what were the facts relating to the merits,” (*id.* at 834 (Sep. Op. Shahabuddeen, J.)) and that the possibility of a treaty violation can be based, not on a definitive treaty construction, but on an “arguable” construction. *Id.* at 833.

Clearly, some claims may be rejected based on a facial examination of the treaty. The ICJ did just that in *Oil Platforms* where some treaty provisions were simply not actionable. For example, Article I of the treaty in *Oil Platforms*, provided that “There shall be firm and enduring peace and sincere friendship between the United States . . . and Iran.” *Id.* at 812 ¶ 24. The ICJ rejected Iran’s argument that this provision “impose[d] actual obligations on the Contracting parties . . . to maintain long-lasting peaceful and friendly relations” (*id.* at 812 ¶ 25) and that therefore any “threat and use of force . . . must . . . be considered as a violation of the Treaty of Amity.” *Id.* at 812-13 ¶ 25. Instead, the ICJ held that while “Article I is . . . not without legal significance . . . [it cannot], taken in isolation, be a basis for the jurisdiction of the Court. *Id.* at 815 ¶ 31.<sup>7</sup> Methanex has not premised its claims on NAFTA’s general provisions or the

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<sup>7</sup> Another example is *Hoffland Honey Co. v. Nat’l Iranian Oil Co.*, 2 Iran-U.S. Cl. Trib. Rep. 41 (Jan. 26, 1983) (Award No. 22-495-2), where the tribunal was called upon to construe a provision in the Claims Settlement Declaration between the United States and Iran which provided jurisdiction over “measures affecting property rights.” In dismissing the claim, the tribunal found that Hoffland:

has alleged only that NIOC sold substantial quantities of crude oil to United States companies engaged in the manufacture of agrichemicals; more about NIOC Hoffland does not say. It does not allege that the sales of oil by NIOC to American companies were unlawful. . . . [W]e think it is clear from the pleadings and the evidence attached thereto that proximate cause has not been alleged. The sales of oil were a ‘cause’ of Hoffland’s loss only in the sense that had there been no oil, and thus no chemicals, the loss would not have occurred.

*Id.* The *Hoffland Honey* tribunal did not set forth a definitive interpretation of the relevant provision. Rather, in *Hoffland Honey*, the tribunal effectively applied Judge Shahabuddeen’s approach by “limit[ing its] consideration-almost restricted to inspection-[of the treaty provisions] for the purpose of determining whether there was ‘a reasonable connection’ between them and the claims . . .” *Oil Platforms* at 827 (Sep. Op. Shahabuddeen, J.). In contrast to the claims rejected in *Oil Platforms* and *Hoffland Honey*, the allegations in Methanex’s pleadings fall squarely within the text of NAFTA and consequently warrant the summary rejection of the United States’ objections.

objectives of the agreement, but instead has plainly pled violations of well-recognized principles of international law reflected in the specific obligations imposed by NAFTA Articles 1102, 1105, and 1110.

If the Tribunal accepts all of Methanex's allegations as true, it cannot seriously be argued that Methanex's claims are "frivolous" or "vexatious." If for example, it is true that Gov. Davis intended to discriminate, there is no doubt that such conduct raises the possibility of numerous NAFTA violations. Furthermore, the Tribunal cannot conclude at this stage that such conduct is *not*, for example, a violation of Article 1105 without making an impermissible merits determination during a preliminary stage. Accordingly, Methanex has alleged far more than is necessary to sustain this Tribunal's jurisdiction.<sup>8</sup>

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<sup>8</sup> Methanex fully agrees with Judge Shahabuddeen's position that no merits question, factual or legal, can be finally resolved at the jurisdiction stage. In addition to the possibility of improper prejudgment, he emphasized that the ICJ "lacks a filter mechanism through which . . . it is possible to argue, ahead of the normal merits phase, that, taking the facts alleged at their highest, they do not justify the claim for the reason that the asserted obligation does not exist in law, or that, if it exists, it is not breached by the alleged facts. The practice of thus 'striking out' an application has not yet developed in proceedings before this Court." 1996 I.C.J. at 830. The UNCITRAL Arbitration Rules similarly lack the type of "filtering mechanism." With the possible exception of *Hoffland Honey*, which is clearly inapplicable here, Methanex has been unable to locate any cases where a claim has been struck out because facts have been insufficiently pled.

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 and reject the preliminary objections of the United States.

July 27, 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*

WA-1257217

**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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**REPLY OF CLAIMANT METHANEX CORPORATION  
TO THE POST-HEARING SUBMISSION OF  
RESPONDENT UNITED STATES OF AMERICA**

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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*

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