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Mexico City, 11 February 2002

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RE: Methanex Corporation vs. The United States of America
Article 1128 submission of the United Mexican States.

Dear Sirs:

Further to the disputing parties' various letters to the Tribunal, my letter dated 21 November 2001 and the Tribunal's letter dated 31 January 2002, I am writing to provide the Government of Mexico's comments on the disputing parties' submissions on the Interpretive Note issued on 31 July 2001 by the Free Trade Commission and the declaration of Mr. Guillermo Aguilar Álvarez filed by the Claimant on 9 November 2001.

I. THE BACKGROUND TO THE NOTE OF INTERPRETATION

The 31 July 2001 Note resulted from the Parties' shared view that it would be appropriate to confirm the scope of Article 1105. As the Note's introductory paragraph states, having reviewed the operation of proceedings conducted under Chapter Eleven, the Commission adopted the interpretations "in order to clarify and reaffirm the meaning of" the provisions of the NAFTA. The Note is thus a clarification and reaffirmation of the proper statement of the governing law. The Note states that Article 1105 refers to the rules of customary international law only.

II. THE COMMISSION'S ROLE AS THE AUTHORITATIVE INTERPRETER OF THE GOVERNING LAW

Pursuant to Article 2001 of the NAFTA, the Commission comprises the trade ministers of the three Parties. It is the highest level policy-making organ and administrator for the Treaty as a whole, charged, *inter alia*, with the following responsibilities:

- the supervision of the implementation of the Agreement;
- the overseeing of its further elaboration;
- the resolution of any disputes that may arise concerning its interpretation or application; and
- the consideration of any other matter that may affect the operation of the Agreement.

The Commission, therefore, is a body comprising cabinet-level representatives of the three States party to the Agreement which is vested with decision-making power under the Agreement.

Under Article 1131(1) and (2), a Tribunal must decide the issues in dispute in accordance with the NAFTA and applicable rules of international law and any interpretation of the Commission. Any interpretation forms part of the governing law from which a Tribunal cannot derogate without acting in excess of jurisdiction.¹

The NAFTA thus contains a mechanism for promulgating authentic interpretations of the Treaty by the States party to it. This mechanism implements in treaty form Article 31(3)(a) of the *Vienna Convention on the Law of Treaties* which specifies as a further element of treaty interpretation any subsequent agreement between the parties regarding the interpretation of the treaty. As Sir Arthur Watts has written:

...an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the

¹ *MINE v. Guinea*, 4 ICSID Reports, 79 at 87.

treaty for the purposes of its interpretation.² [Emphasis added]

The Commission, acting under the authority conferred to it in Article 1131(2), issued the 31 July Interpretive Note. Mexico observes that the NAFTA, including Article 1131(2) and the power created thereby, was considered and approved by the legislatures of each of the States party to the Treaty. The members of the Commission have therefore been entrusted by their respective legislatures to safeguard the Agreement through the issuance of interpretations which then bind tribunals.

III. MR. AGUILAR ÁLVAREZ'S DECLARATION

Mexico has considered the declaration of Mr. Guillermo Aguilar Álvarez filed by the Claimant on 9 November 2001. Mr. Aguilar Álvarez's statement should not be given weight for several reasons.

First, in interpreting an international treaty, the provisions of the treaty itself must govern, particularly when they include rules regarding the treaty's interpretation. The NAFTA includes such rules in Article 1131(2). The jurisdiction of arbitral tribunals established under Section B of Chapter Eleven is created and governed by Chapter Eleven itself, and, thus, is subject to any limitations set forth therein. An Arbitral Tribunal must, therefore, act in accordance only with such rules if it is to exercise properly the jurisdiction conferred upon it.

The Commission, the NAFTA's most authoritative interpreter, has issued a binding interpretation regarding Article 1105. That, alone, is dispositive. It would be inappropriate in such circumstances for a Tribunal bound by Article 1131(2) to interpret Article 1105 in a manner contrary to the Commission as Mr. Aguilar Álvarez suggests.

Second, Mexico notes that the present recollection of one of many participants in the negotiations, especially when it is disavowed by his own State, does not even constitute *travaux préparatoires* that could eventually be relied upon by a tribunal. In his recent text, Modern Treaty Law and Practice, Anthony Aust described what constitutes the *travaux préparatoires* of a treaty:

² Sir Arthur Watts, The International Law Commission 1949-1998, Volume Two: The Treaties, Part II (Oxford University Press) at 689.

...it is generally understood to include written material, such as successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee and ILC Commentaries...The value of the material will depend on several factors, the most important being authenticity, completeness and availability. The summary record of a conference prepared by an independent and skilled secretariat, such as that of the United Nations, will carry more weight than an unagreed record produced by a host state or a participating state.³

Mr. Aguilar Álvarez's statement proffered by the Claimant is based solely on his personal recollection of events that transpired approximately ten years ago, and, therefore, does not meet the generally accepted criteria for *travaux préparatoires*. It does not even reach the status of an unagreed record produced by a participating state because Mexico does not agree with Mr. Aguilar Álvarez's statement or the conclusions that he sets out.

Third, as a purely factual matter, as the United States previously advised the Tribunal, Mexico has conducted a search of its records of the negotiations. Mexico has found no negotiating proposal by any of the three Parties that included the word "customary" in relation to "international law" and therefore no evidence that the word was deleted after discussion by the Parties. The Government of Mexico does not agree with Mr. Aguilar Álvarez's analysis of the negotiations or of the legal effect of the text that ultimately emerged from them.

In summary, under the general rule of interpretation in Article 31(1) of the *Vienna Convention*, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Thus, what is relevant is the text of the treaty that resulted from the negotiations, not a single participant's recollection of a complex trilateral negotiation. Article 32 of the *Vienna Convention* allows recourse to *supplementary* means of interpretation, such as the *travaux préparatoires*, *i.e.*, the history of the negotiations, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. In light of NAFTA Article 1131(2) and the Commission's having expressly and recently turned its

³ Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press (2000) at p. 198.

mind to the meaning to be ascribed to Article 1105, there is no need to seek to resort to supplementary means of interpretation.

IV. CONTEMPORANEOUS STATEMENTS

The contemporaneous statements of parties to a treaty can give insight into what was done at the time. Mexico respectfully directs the Tribunal to the *Statement on Implementation* published by the Government of Canada on 1 January 1994, the date that NAFTA entered into force. The *Statement* is Canada's official description of what was intended in the NAFTA. It states with respect to Article 1105:

Article 1105, which provides for treatment in accordance with international law, is intended to assure a minimum standard of treatment of investments of NAFTA investors. ...this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law...⁴ [Emphasis added]

The Government of Canada formally transmitted its *Statement on Implementation* to both of the other NAFTA Parties on 29 December 1993. The letter of transmission to Mexico's Secretary of Commerce, Jaime Serra Puche, signed by Canada's Minister for International Trade, states "the Statement is an authoritative record of Canada's intended approach to the interpretation and implementation of the NAFTA...".

Mexico did not publish a similar official statement and the United States' *Statement of Administrative Action* is silent on the issue of customary international law. Neither Party took issue with Canada's *Statement* because it was unobjectionable. The 31 July 2001 Note of Interpretation is fully consistent with Canada's contemporaneous official statement .

⁴ Canada Gazette, Part I, January 1, 1994 at p. 149.

V. READ IN CONTEXT, ARTICLE 1105 CANNOT BE INTERPRETED AS AUTHORIZING A TRIBUNAL TO DETERMINE BREACHES OF CONVENTIONAL INTERNATIONAL LAW

An important contextual reason dictates why Article 1105 does not extend a Tribunal's jurisdiction to other international treaties or indeed to the balance of the NAFTA itself. According to Article 31 of the *Vienna Convention*, Article 1105 must be read in the context of the Treaty as a whole. Reading international treaties into the Minimum Standard of Treatment would be contrary to the NAFTA's architecture and negate Articles 1116 and 1117, contrary to the principle of effectiveness in treaty interpretation.

Articles 1116 and 1117 establish that a Chapter Eleven Tribunal has jurisdiction over the obligations set out in Section A and two subparagraphs of Chapter Fifteen and no other. Similarly, NAFTA's Financial Services chapter, Chapter Fourteen, incorporates certain selected articles of Section A and the whole of Section B, thus permitting investor-State arbitration of such *selected* obligations for financial services investments.⁵

The express reference to two subparagraphs located outside of Chapter Eleven into Articles 1116 and 1117 and Article 1401 demonstrate that the drafters knew how to subject other conventional NAFTA obligations to investor-State arbitration where that was intended.

For *all* other NAFTA obligations, only a NAFTA Party has the necessary standing to allege breaches of the NAFTA and such a dispute would take place in a State-to-State proceeding pursuant to Chapter Twenty.⁶ Thus, the rest of the very treaty in which Chapter Eleven is situated is itself beyond the jurisdiction of a Chapter Eleven tribunal. If a Chapter Eleven tribunal cannot determine a breach of another chapter of the Agreement, it logically follows that it cannot have the jurisdiction to determine a breach of other international agreements such as the WTO Agreements. In this respect, Mexico agrees

⁵ See Article 1401(2).

⁶ With the exception of certain articles that are not subject to dispute settlement at all or that are subject to a special mechanism such as those under Chapter Nineteen for anti-dumping and countervailing duty disputes.

with the United States' characterization of the WTO Agreements as containing obligations that are analogous to the NAFTA's non-investment obligations.⁷

Interpreting Article 1105 to allow a tribunal to read into that article all of the Parties' other non-customary international law treaty obligations and determine alleged violations of such other treaties would negate Section B's jurisdictional-limiting provisions. In addition, the Commission's 31 July 2001 Note specifically states that "a determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)".

VI. THE CLAIMANT CONSENTED TO ALL OF SECTION B, INCLUDING ARTICLE 1131(2)

Mexico disagrees with any suggestion that it is "improper" to apply the Commission's Note of Interpretation to ongoing arbitrations. The Claimant, like all other claimants, consented to the arbitral process established by Section B when it commenced this proceeding. It therefore consented to the possibility that the three Parties, acting collectively, would from time to time issue interpretations that would form part of the governing law of the proceeding. Any implication that the NAFTA Parties must wait for a hiatus in all proceedings in order to issue an interpretation must be rejected.

It was Mexico's understanding and expectation that each Party would inform extant tribunals of the Commission's Note.

VII. CONCLUSION

Mexico's view is that the Note of Interpretation is an authoritative statement of the scope and meaning of Article 1105 at the time of NAFTA's entry into force.

There has been no change to the meaning of Article 1105, or amendment to the Treaty, but rather a reaffirmation and clarification of its meaning after a series of errant decisions in certain cases showed the need for the Parties to act collectively. In acting collectively, the Parties act as the guardians of the Treaty. They have reserved the legal right and the duty to

⁷ At p. 34 of the United States' Rejoinder Memorial on Jurisdiction, Admissibility and the Proposed Amendment, 27 June 2001.

clarify to tribunals the meaning of the obligations that they agreed to undertake. Once they exercise their power, a tribunal must comply with the Commission's interpretation.

All of which is respectfully submitted

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