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

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

RESPONSE OF RESPONDENT UNITED STATES OF AMERICA TO METHANEX'S REQUEST TO LIMIT *AMICUS CURIAE* SUBMISSIONS TO LEGAL ISSUES RAISED BY THE PARTIES

Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
Barton Legum
Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes
Andrea J. Menaker
David A. Pawlak
Jennifer I. Toole
Attorney-Advisers, Office of International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

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In accordance with the Tribunal's directions given at the procedural hearing on March 31, 2003, the United States respectfully submits the following response to Methanex's request to limit *amicus curiae* submissions to legal issues.

PRELIMINARY STATEMENT

Contrary to Methanex's suggestion, the issue in dispute between the parties is not whether *amici* should be permitted to submit evidence, but whether *amici* may address factual as well as legal issues in their submissions. Neither party suggests that *amici* should be permitted, for example, to submit evidence into the record at an evidentiary hearing, or to add allegations of fact to a statement of claim.

On the other hand, *amici* can offer a *perspective* on factual issues that is as valuable to the Tribunal's mission as is the *amici*'s perspective on the law. Contrary to

Methanex's contention, the value to the adjudicatory function of *amici*'s perspective on the facts is well recognized, and for good reason. Methanex's proposal to limit the scope of *amicus* submissions, if accepted, would contravene the weight of jurisprudence and deprive the Tribunal of a useful source of insight on the important issues before it.

In the brief discussion that follows, we first demonstrate that comment by *amici* on factual issues is a well-established practice in both municipal and international fora. We then show that, contrary to Methanex's arguments, the NAFTA in no way precludes *amici* comment on such issues. Finally, we establish that Methanex's arguments based on fairness are without merit.

I. COMMENT ON FACTUAL ISSUES BY *AMICI* IS WELL ESTABLISHED IN BOTH INTERNATIONAL AND DOMESTIC JURISPRUDENCE

In its January 15, 2001 Decision on Petitions from Third Persons to Intervene as "Amici Curiae" (the "*Amicus* Decision"), this Tribunal relied, among other things, on the fact that the Iran-United States Claims Tribunal and the World Trade Organization have determined that they have authority to accept *amicus* submissions. *See Amicus* Decision ¶¶ 32-33. The practice of these international tribunals illustrate that *amici* in those fora are not restricted to comment on legal issues.

As the Tribunal noted in its *Amicus* Decision (¶ 32), the Iran-United States Claims Tribunal accepted an *amicus* submission from foreign banks in *Iran v. United States*, Case A/15. As indicated by the United States at the March 31 hearing, that submission

addressed factual, as well as legal, issues.[1] *Amicus* submissions in WTO panel proceedings have similarly offered a perspective on factual issues.[2]

Contrary to Methanex's assertion, there is a long tradition in the United States of *amicus* submissions addressing issues other than principles of law. Such submissions include what are commonly referred to as "*Brandeis* briefs" – so named in reference to former Associate Justice of the U.S. Supreme Court, Louis D. Brandeis, who before taking the bench made famous the use of such briefs. A *Brandeis* brief is "[a] brief, usu[ally] an appellate brief, that makes use of social and economic studies in addition to legal principles and citations."[3] As an attorney, Justice Brandeis filed one such brief in *Muller v. Oregon*,[4] in which he persuaded the U.S. Supreme Court to uphold a statute setting a maximum ten-hour workday for women.[5] *Brandeis* briefs were also influential

[1] The factual emphasis of the submission is evident from its title: Memorial of the United States Banking Institutions on the Issue of the Balance of Dollar Account No. 1 (Oct. 14, 1983).

[2] *See, e.g., US - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, Submission filed by the Interior Alliance Indigenous Nations*, WT/DS236 (Apr. 15, 2002); *US - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Submission filed by the Natural Resources Defense Council, et. al*., WT/DS257 (Jan. 17, 2003); *see also WTO, Dispute Settlement Body – Special Session – Contribution of the European Communities and its Member States to the Improvement of the WTO Settlement – from the European Communities*, TN/DS/W/1 at 7 (Mar. 13, 2002) ("*amicus curiae* submissions should be directly relevant for the *factual and legal issues* under consideration by the panel, or the legal issues raised in the appeal.") (emphasis added). In addition, the United States notes that in the paragraph following the one cited by Methanex in its submission, Jordan expressed the view that "[t]his right of intervention would allow an interested person or group (such as environmental organizations, competing private sector firms, and citizens) to present evidence and arguments (*legal or otherwise*) to the panel or Appellate Body which would provide for increased transparency *and expert information* that would not be presented in Members[']submissions."). *WTO, Jordan's Contributions Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/43 ¶ 36 (Jan. 28, 2003) (emphasis added).

[3] Black's Law Dictionary at 182 (7th ed. 1999).

[4] 208 U.S. 412 (1908).

[5] The term *Brandeis* brief was derived from this filing. *See supra* n.3.

in *Brown v. Board of Education*,[6] the landmark Supreme Court case addressing school desegregation.

A recent, high-profile United States Supreme Court case illustrates this point. *Grutter v. Bollinger* raises issues concerning the constitutionality of the University of Michigan's affirmative action policy in law school admissions. Among the *amicus* submissions in the case was a brief filed by several retired military officers concerning admissions policies and minority representation at several military academies – a submission that predominantly focused on factual issues.[7] The U.S. Supreme Court not only considered the submission, but singled it out for attention during oral argument earlier this month.[8]

As Methanex acknowledges, U.S. courts retain broad discretion to accept and consider *amici* submissions. Methanex Submission at 3. Contrary to Methanex's suggestion, however, there is no presumption or requirement that those submissions will be confined to legal issues. Nor does U.S. law or practice indicate a presumption against the acceptance of *amicus* submissions in trial courts.[9] To the contrary, there is a well-established practice in U.S. courts of accepting *amicus* submissions that address factual issues.

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[6] 347 U.S. 483 (1954).

[7] *See* Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., *et al*., *Grutter v. Bollinger*, Nos. 02-241, 02-516, 2003 WL 1787554 (U.S. Feb. 21, 2003).

[8] *See Grutter v. Bollinger*, Nos. 02-241, 02-516, Transcript of Oral Argument at 7-9, 12, 19 (U.S. Apr. 1, 2003), *available at* <http://www.supremecourtus.gov/oral-arguments/argument_transcript/02-241.pdf>.

[9] *See, e.g., Doe v. Karadzic*, 866 F. Supp. 734, 742 n.14 (S.D.N.Y 1994), *rev'd on other grounds*, 70 F.3d 232 (2d Cir. 1995); *see also Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003) (trial court accepting amicus submission); *In re Worldcom, Inc. Securities Litig.*, 2003 U.S. Dist. LEXIS 2790 (S.D.N.Y. 2003) (same).

II. PERMITTING *AMICI* TO COMMENT ON FACTUAL ISSUES IS NOT INCONSISTENT WITH THE NAFTA

When this Tribunal ruled that it had the authority under the UNCITRAL Arbitration Rules to accept *amicus* submissions in this NAFTA Chapter Eleven arbitration, it rejected Methanex's argument that accepting such submissions would grant *amici* greater rights than the NAFTA Parties have under NAFTA Article 1128. *See Amicus* Decision ¶ 38. Methanex's attempt to resurrect that failed argument as a rationale for restricting the content of *amici* submissions should likewise be rejected.

First, as this Tribunal held, a tribunal's discretionary authority to accept a submission by an *amicus* is not akin to a Party's *right* to make a submission pursuant to Article 1128. *See id.* The Tribunal thus correctly rejected the argument that accepting *amicus* submissions would grant *amici* greater rights than the NAFTA Parties. It is notable that the NAFTA investor-State tribunal in the *UPS* case subsequently followed the Tribunal's reasoning in this regard.[10]

Second, Methanex's argument fails on its terms. Methanex, relying on NAFTA Article 1128, seeks to limit *amici* to commenting on legal issues. Article 1128, however, provides that a non-disputing Party has a right to make a submission "*on a question of interpretation of* [*the NAFTA*]." An *amicus* submission that comments on legal issues may therefore be broader than Article 1128 submissions, which are restricted to addressing only one genre of legal issues: interpretation of the NAFTA's provisions. The text of Article 1128 does not support Methanex's argument that the NAFTA restricts *amici* to comment on legal issues because otherwise their submissions would be broader

in scope than Article 1128 submissions. The terms of Article 1128 have no impact on the scope of permissive *amicus* submissions.

Similarly, Methanex's argument that Article 1133 somehow restricts the permissible scope of *amicus* submissions is without merit. Article 1133 provides that the Tribunal may, under certain circumstances, appoint an expert. As this Tribunal recognized, however, "[*a*]*mici* are not experts; such third persons are advocates (in the non-pejorative sense) and not 'independent' in that they advance a particular case to a tribunal." *Amicus* Decision ¶ 38; *see also UPS Amicus* Decision ¶ 62 (differentiating between an *amicus* and an Article 1133 expert). Because an *amicus* serves a different function from an expert, it is of no consequence whether the scope of an *amicus* submission may, in theory, overlap with the scope of an expert's submission. The observation of the *UPS* tribunal is apposite on this point:

> [Article 1133 is concerned with] the power of the Tribunal to seek the assistance of independent experts on specialised factual matters. *The contribution of an* amicus *might cover such ground*, but is likely to cover quite distinct issues (especially of law) and also to approach those issues from a distinct position.

Id. (emphasis added).

For the same reasons that Articles 1128 and 1133 of the NAFTA posed no impediment to this Tribunal's acceptance of *amicus* submissions, those articles do not provide any basis for restricting the content of those submissions. The United States

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[10] *United Parcel Service of America Inc. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae ("*UPS Amicus* Decision") ¶¶ 61-62 (Oct. 17, 2001), *available at* <http://www.d-fait-maeci.gc.ca/tna-nac/parcel-en.asp>.

respectfully submits that the *Amicus* Decision suggests this same conclusion by acknowledging the possibility that *amici* submissions could address factual issues.[11]

III. EQUITABLE CONSIDERATIONS DO NOT WARRANT RESTRICTING THE CONTENT OF *AMICUS* SUBMISSIONS

Methanex appeals to this Tribunal to restrict the content of *amici* submissions on grounds of equity and fairness. Neither justifies imposing the restrictions proposed by Methanex.

First, Methanex distorts the nature of investor-State arbitration and its alleged burden in this case. In support of limiting the scope of *amici* submissions, Methanex complains that it "is a private company that is fighting against an array of U.S. federal and state agencies as well as Canada and Mexico." Methanex Submission at 4. The United States alone is the respondent in this case; Methanex is not arbitrating against Canada or Mexico. Nor is there any basis to presume that because Mexico and Canada made Article 1128 submissions at an earlier stage in these proceedings, those countries will make Article 1128 submissions at the next stage of these proceedings (let alone that any such submissions will be in accord with the position of the United States).

Second, Methanex's concerns regarding an undue burden are most appropriately addressed through procedural mechanisms, such as establishing page limitations for *amici* submissions. At the hearing, the parties indicated that they had agreed to such a limitation. Despite the requests of the *amici* to file submissions not to exceed 40 pages in length, the United States has agreed with Methanex to propose that this Tribunal limit

[11] *See Amicus* Decision ¶ 36 ("[I]t would always be for the Tribunal to decide what weight (if any) to attribute to those [*amici*] submissions. Even if any part of those submissions were arguably to constitute written 'evidence', the Tribunal would still retain complete discretion . . . to determine its admissibility, relevance, materiality and weight.").

amici submissions to no more than 20 pages. This reasonable limitation ought to ensure that no party to this arbitration will be unfairly burdened by having to respond to *amici* submissions.

CONCLUSION

For the foregoing reasons, and those stated at the March 31, 2003 procedural hearing, the United States respectfully submits that the Tribunal should deny Methanex's request to limit the content of submissions by *amici curiae* to legal issues.

Respectfully submitted,

Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
Barton Legum
Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes
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