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Re: Methanex Corporation v. United States of America

Gentlemen:

This letter and the enclosed Opinion of Sir Robert Jennings ("Second Jennings Op.") (Exhibit 1) are occasioned by the NAFTA Free Trade Commission's July 31, 2001 "interpretation" of NAFTA Article 1105, which was submitted to the Tribunal by counsel for the

United States on that same day, together with a letter arguing that the "interpretation" is binding on this Tribunal.[1]

The July 31, 2001 "interpretation" of Article 1105 should have no material impact on this proceeding, for it does not — and cannot — in any way alter the substance of NAFTA's investment protections. While the effect of the "interpretation" is not entirely clear, if anything it confirms that "fair and equitable treatment" and "full protection and security" are part and parcel of the customary international law standard for the treatment of investors and their investments. Further, the Free Trade Commission ("FTC") "interpretation" in no way contradicts the common sense conclusion that violations of independent treaty provisions may constitute a breach of Article 1105. The United States will likely argue here — as it has already argued in *Loewen* — that because of this "interpretation," Governor Davis and the State of California were *not* required to treat Methanex fairly and equitably or provide appropriate protection, and that the words "international law" used in Article 1105 do not include any U.S. treaty obligations besides Article 1105 itself. If that is indeed the United States' position, then it is, to use Sir Robert Jennings' term, "preposterous." (Second Jennings Op. at 4.) This is so for four reasons, which we summarize immediately below and expand upon in the sections that follow.

> *First*, the text of NAFTA explicitly requires "fair and equitable treatment" and "full protection and security" for all NAFTA investments, without exception. It also explicitly requires treatment in accordance with "international law," not "customary international law." Until such protections are actually deleted from the text of NAFTA through the formal amendment process required under Article 2202, they must be the controlling legal principles in this case.

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[1] The FTC "interpretation" was submitted by the United States to the Tribunal in another NAFTA case, *The Loewen Group, Inc. v. United States*. The Second Jennings Opinion was prepared by Sir Robert for use in both this case and *Loewen*. Because this Opinion was filed first in the *Loewen* case, the record citations within the Opinion often refer to the particular pleadings filed in *Loewen*. The substance of the opinion is, of course, equally applicable here. Moreover, because the United States is likely to take similar positions here to those it has taken in *Loewen*. Methanex has cited to several relevant submissions recently filed in that proceeding.

Second, the actual text of the FTC "interpretation" does not support the meaning now proffered by the United States. In an apparent attempt to change NAFTA substantively while disguising it as a mere "interpretation," the FTC used somewhat opaque and imprecise language. But the actual language of the "interpretation" identifies the "fair and equitable treatment" and "full protection and security" standards as part of the body of customary international law regarding the treatment of investors and their investments. Similarly, the "interpretation" does not preclude Article 1105 claims based upon violations of independent treaty obligations.

Third, the FTC lacks the power to delete protections from NAFTA or diminish their scope, because such a change would constitute an amendment to NAFTA, not an interpretation. NAFTA amendments must follow the procedures set out in Article 2202(2), including, in the case of the United States, the constitutionally mandated approval of the United States Congress. Those procedures allow parties that benefit from NAFTA provisions, including investors, to exercise their democratic right to influence any changes government officials might attempt to impose unilaterally.

Fourth, even if the FTC "interpretation" were effective in reducing the scope of investment rights under Article 1105, NAFTA's most-favored-nation provision, Article 1103, would still require the United States to accord investments the same independent protections of "fair and equitable treatment" and "full protection and security," because those protections appear in other bilateral investment treaties ("BITs") to which the United States is a party, and which have not been subjected to the same sort of "interpretation" urged by the United States.

This Tribunal's role thus remains unchanged: Article 1105 requires it to determine, based on all the relevant facts and circumstances, whether the United States and the State of California treated Methanex and its investments fairly and equitably, accorded it full protection and security, and observed all other relevant investment-related treaty obligations that protected Methanex. If they did not, then the United States is liable.

I. The Tribunal Must Give The Terms of Article 1105 Their Ordinary Meaning

The Vienna Convention on the Law of Treaties requires that NAFTA be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (May 23, 1969), art. 31(1). The NAFTA Tribunal in *The Loewen Group Inc., et*

al. v. United States (Juris. Award, Jan. 5, 2001), Case No. ARB(AF)/98/3 (2001) (*found in* Claimant Methanex Corporation's Appendix of Authorities for its Counter-Memorial on Jurisdiction, Tab 34) has further ruled that NAFTA should be given a "liberal . . . interpretation" in order to effect the treaty's purpose of protecting investors and investments. *Id*. ¶ 53 (discussing the NAFTA term "measures").

Mexico has in the past agreed that the phrase "fair and equitable treatment" is to be given its ordinary meaning, and that Article 1105 therefore incorporates ordinary requirements of fairness and equity. *See, e.g., Azinian v. Mexico*, Mex. Counter-Mem. ¶¶ 248-49. Before the *Azinian* NAFTA Tribunal, Mexico — like Methanex in this matter — urged that "[t]he ordinary meaning of the word 'fair' is 'just, unbiased, equitable; in accordance with the rules' and that the ordinary meaning of the word 'equitable' is 'fair and just.'"[2] *Id*. ¶ 250. Mexico made the same argument in *Metalclad v. Mexico* (*Metalclad*, Counter-Mem. ¶¶ 834-36), and the *Metalclad* Tribunal agreed. *See Metalclad* (Award of Aug. 30, 2000) ¶ 101 (holding "that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105").

The United States cannot credibly argue, as it did at the recent jurisdictional hearing in this case, that the concept of "fair and equitable" treatment is too "unknown" or "subjective" to be given its ordinary meaning, or that it requires any *post hoc* "interpretation." (Tr. at 173:10; *id.* at 248:4-10.) The "fair and equitable" standard is, as discussed below, an intrinsic part of international law and, indeed, United States law. *See, e.g., U.S. v. Sears, Roebuck and Co.*, 778 F.2d 810, 816-17 (D.C. Cir. 1985) (Ginsburg, J.) (finding promise modifying contract with U.S. government concerning antidumping duties to be "fair and equitable;" rejecting other U.S. government argument as "hardly rational"); *Restatement (Second) of Contracts* § 89 (1981) (same); 5 U.S.C. § 2301 (2001) ("All employees and applicants for employment should receive fair and equitable treatment"); 7 U.S.C. § 2279a (2001) ("Fair and equitable treatment of

[2] Dictionaries define "fair" as "[f]ree from bias, fraud, or injustice; equitable, legitimate," and they define "equitable" as "[c]haracterized by equity or fairness . . . . That is in accordance with equity; fair, just, reasonable." V *The Oxford English Dictionary*, 67, 357 (2d ed. 1989).

socially disadvantaged producers"); 19 U.S.C. § 2411 (2001) (U.S. Trade Representative to take action if foreign countries deny U.S. entities "fair and equitable" opportunities). While the fair and equitable standard may not be reducible to a single formulation applicable to every set of circumstances, the standard is routinely applied by international and U.S. judges in a variety of different contexts. There is no reason why this Tribunal cannot apply the same standard to the California measures.

Furthermore, "fair and equitable treatment" is hardly the only legal concept that defies simplistic characterization. "Due process," "duress" and "negligence" are only three examples of the multitude of legal rules that rely on evolving notions of fairness, balancing of equities, and generally accepted standards of reasonableness. The fact that such standards are dependent upon the facts of each particular set of circumstances does not make them "unknown" or overly "subjective," does not render such rules any less binding, and does not mean they should be given anything other than their ordinary meaning.

Indeed, the FTC statement does not attempt in any way to alter this international law requirement that the Tribunal give "fair and equitable treatment" and "full protection and security" their ordinary meaning. Nor does the "interpretation" purport to change these ordinary meanings, but rather shows that those guarantees are part of customary international law, as is also discussed below. Thus, applying the ordinary meaning of Article 1105, California was required to accord Methanex's investments "fair and equitable treatment" and "full protection and security." (*See also* Second Jennings Op. at 3-4.)

Similarly, the Tribunal must give the Article 1105 term "international law" its ordinary meaning. The phrase "international law" normally includes both customary and conventional (*i.e.*, treaty) law. Indeed, according to the International Court of Justice, treaty obligations are the *primary* source of "international law." *See* Stat. of I.C.J., art. 38(1)(a) (placing "international conventions, whether general or particular" at the top of a list of sources of international law). Accordingly, the NAFTA text on its face requires that NAFTA States accord to NAFTA

investments the protections of both customary and conventional international law, *i.e.*, independent treaty obligations that are binding on the NAFTA parties.

In fact, the word "customary" was actually *deleted* from one of the negotiating texts of NAFTA. Mr. Guillermo Aguilar Alvarez, one of the principal Chapter 11 negotiators for Mexico, recalls that one of the proposed versions of what became Article 1105 or its equivalent used the phrase "customary international law." (The United States almost certainly has a copy of this text; however, it has chosen to withhold it from this Tribunal). When Mexico resisted the use of the term "customary," the United States negotiators pointed out that deleting the word would expand the coverage of Article 1105 by bringing in other legal obligations, including independent treaty obligations between or among the NAFTA Parties. Mexico had no objection to incorporating such obligations into Article 1105, and the three countries eventually agreed to the present text of NAFTA Article 1105. Mr. Aguilar Alvarez has publicly taken this position concerning the scope of Article 1105 (*see* Exhibit 2) and will provide a formal statement to the Tribunal if requested.[3]

Accordingly, applicable rules of treaty interpretation require this Tribunal to give the phrases "fair and equitable" and "international law" their ordinary meaning. To the extent that the FTC "interpretation" is inconsistent with these meanings, it is irrelevant and ineffective.

II. The July 31, 2001 FTC Interpretation Shows that Article 1105 Protects Against Unfair and Inequitable Treatment and Violations of Independent Treaty Obligations

Not only the plain text of NAFTA, but even the actual language of the FTC "interpretation" supports Claimant's position with regard to Article 1105. The relevant text of Article 1105 states:

> Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

In pertinent part, the FTC "interpretation" states:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law standard of treatment of aliens.

3. 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).

Id., ¶¶ B(1-3).

In adopting this "interpretation," the FTC did not state that investments are no longer entitled to fair and equitable treatment and full protection and security. It also did not state that independent treaty violations can never constitute a violation of Article 1105. The FTC interpretation avoids such straightforward language, almost certainly because it recognized that a clear statement of such an intent would always be seen as an improper amendment of Article 1105. Instead, the FTC used a linguistic formulation that, if carefully parsed, recognizes that the protections of "fair and equitable treatment" and "full protection and security" are part of customary international law. Likewise, the formulation does not preclude a finding that a violation of an independent treaty obligation may also, in appropriate circumstances, constitute an Article 1105 violation. In other words, the FTC interpretation's actual language is consistent with Claimant's position in this case.

A. The "Fair and Equitable Treatment" and "Full Protection and Security" Standards Are Part of Customary International Law

Paragraph 1 of the FTC "interpretation" identifies Article 1105(1) — which expressly includes the terms "fair and equitable treatment" and "full protection and security" — as the "customary international law minimum standard of treatment of aliens." Similarly, Professor

[3] Mr. Aguilar Alvarez has been retained as one of Methanex's experts in this matter.

Greenwood, a U.S. expert in the *Loewen* case, has agreed that the requirements of "fair and equitable treatment" and "full protection and security" are part of customary international law. *See Loewen,* Second Greenwood Op. at 39, submitted as an attachment to the U.S. Rejoinder of August 27, 2001 (referring to "the requirements of 'fair and equitable treatment' and 'full protection and security'" as "part of the customary international law on the treatment of aliens") (relevant portions attached as Exhibit 3). Both statements thus acknowledge the prominent role these standards play in customary international law.

At the jurisdictional hearing, the United States admitted 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." (Tr. at 514:12-15.) This is as it should be: "Customary international law," according to the *Restatement (Third) of Foreign Relations Law* § 102(2) (1986), "results from a general and consistent practice of states followed by them from a sense of legal obligation."

> The practice necessary to create customary law may be of comparatively short duration, but under Subsection (2) it must be "general and consistent." A practice can be general *even if it is not universally followed*; there is no precise formula to indicate how widespread a practice must be, but it should reflect *wide acceptance among the states particularly involved in the relevant activity*.

Id., cmt. b (emphasis added).[4]

Treaty provisions are the most powerful evidence of the sort of State practice that evolves into customary international law. *See id.*, cmt. i ("International agreements constitute practice of states and as such can contribute to the growth of customary law . . ."); *see also* I. Brownlie, *Principles of Public International Law* 12 (5th ed. 1998) (noting that where treaties reflect an "explicit acceptance" of a rule by a large number of States, they possess a "strong law-creating

[4] *See also id.*, cmt. e ("The practice of states in a regional or other special grouping may create 'regional,' 'special,' or 'particular' customary law for those states *inter se*.").

effect at least as great as the general practice considered sufficient to support a customary rule."); Vienna Convention, art. 38 (recognizing that "a rule set forth in a treaty [may] becom[e] binding upon a third State as a customary rule of international law, recognized as such"). Provisions such as those found in the bilateral investment treaties may become part of customary international law when "there is a wide network of similar bilateral arrangements." *Restatement, supra,* § 101, cmt. d; *see id.* § 102, cmt. i ("[a] wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law."). As former U.S. State Department Legal Advisor Davis R. Robinson has stated:

> The emphasis in the establishment of new customary law should be on actual state practice . . . . States have shown their real practice by establishing a network of international treaties. . . . Of more recent significance is the emergence of a new type of treaty, the bilateral investment treaty (BIT). . . . They [the BITs] reflect actual state practice . . . .

D. Robinson, *Expropriation in the Restatement (Revised)*, 78 Am. J. Int'l L. 176, 177-78 (1984).[5] Similarly, provisions of "multilateral agreements may come to be [customary international] law" where they are "widely-accepted" and "not rejected by a significant number of important states." *Restatement, supra*, § 102, cmt i.

The "fair and equitable treatment" and "full protection and security" standards are now so commonly used in bilateral and multilateral investment treaties that they have become part of the customary international law protecting aliens and their investments. Approximately 1,800 bilateral investment treaties are now in place, covering some 170 countries. *See* A. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, ICSID News, Vol. 17, No. 2 (Fall 2000) *found at* http://www.worldbank.org/icsid/news/n-17-2-5.htm

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[5] *See also* F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 British Y.B. Int'l Law [1981] 241, 249 (1982) ("The importance of the [BITs and their predecessor Friendship, Commerce and Navigation ("FCN") treaties] lies in the contribution they make to the development of customary international law, in their being a source of law. . . . [T]hese treaties establish and accept and thus enlarge the force of traditional conceptions.").

(visited Sept. 14, 2001). "*Nearly all* recent BITs require that investments and investors covered under the treaty receive 'fair and equitable treatment. . . .'" R. Dolzer & M. Stevens, *Bilateral Investment Treaties* 58 (1995) (emphasis added).[6] Similarly, numerous multilateral treaties in North America, South America, Africa, Asia, and Europe have also adopted the "fair and equitable treatment" requirement. These multilateral treaties include NAFTA, the Fourth ACP-EEC Convention (Lomé IV),[7] the ASEAN Treaty,[8] the Colonia Protocol of MERCOSUR (the Southern Common Market) (as well as the Investment Protocol applicable to non-MERCOSUR States),[9] COMESA (the Common Market for Eastern and Southern Africa),[10] and the Energy Charter Treaty among European States.[11] Through this blanket of bilateral and multilateral investment treaties, the "fair and equitable treatment" requirement has been adopted by

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[6] *See also* M. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, Table C, 233, 237, *in* I. Shihata, *Legal Treatment of Foreign Investments, "The World Bank Guidelines"* (1993) (92% of all BITs contained a "fair and equitable treatment" provision).

[7] ACP-EEC Convention (Lome IV), Article 258(b) (1989) (requiring "fair and equitable treatment" be accorded to investors), *found in* 29 *International Legal Materials* 809, 864 (1990).

[8] Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments (the ASEAN Treaty), Articles 3(2) and 4(1) & (2) ("General Obligations" and "Treatment") (1987) (requiring "fair and equitable treatment" and "full protection and security"), *found in* P. Davidson, *Trading Arrangements in the Pacific Rim: ASEAN and APEC*, Booklet I.B.12.a, at 3-4 (1996).

[9] Colonia Protocol on Reciprocal Promotion and Protection of Investments within MERCOSUR, Article 3(1) (1994) (requiring "en todo momento un tratamiento justo y equitativo") *found in* UNCTAD, *International Investment Instruments: A Compendium* (1996), vol. II, 513, 515, and Protocol on Promotion and Protection of Investments coming from States not parties to MERCOSUR (1994) (same) *found in id.* at 527, 530.

[10] Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), Article 159(1)(a) (1993) (requiring "fair and equitable treatment" for investors), *found in* 33 *International Legal Materials* 1067, 1107(1994).

[11] Energy Charter Treaty among European States, Article 10(1) (requiring "fair and equitable treatment" and "most constant protection and security"), *found in International Investment Instruments, supra*, vol. II, 540, 555.

approximately 160 nations and many of their territories, including virtually every major trading and investing state on earth. (*See* Map of States Which are Signatories to a Bilateral or Multilateral Treaty Which Includes a "Fair and Equitable" Provision, attached as Exhibit 4.)

The "full protection and security" requirement has also been given widespread acceptance: "*[T]he majority* of BITs subscribe to common standards" including "fair and equitable treatment" and "full protection and security." Dolzer & Stevens, *supra*, at 58 (emphasis added).

In sum, not only are the "fair and equitable treatment" and "full protection and security" standards part of both NAFTA and conventional international law, the near-universal adoption of these investment protections shows that they are now principles of customary international law as well. The FTC's "interpretation" and the U.S. expert Professor Greenwood's Opinion are merely the latest recognitions of this development.

B. Customary International Law Has Always Required Fairness, Equity, and Due Process

Even if "fair and equitable treatment" and "full protection and security" had not become, through their nearly universal adoption, independent requirements of customary international law, it is nonetheless indisputable that customary international law has always incorporated concepts of equity, fairness, due process, and appropriate protection. The concepts of fairness and equity lie at the heart of international law and legal systems around the world, and are applied on a daily basis by judges and arbitrators in both common-law and civil-law systems. *See, e.g., North Sea Continental* Shelf, 1969 I.C.J. 3, 48; *Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, Preliminary Objections, 1964 I.C.J. 6, 62-63 & 32 (1964) (op. of Koo, J.). Judge Hudson, in his separate concurring opinion in *Diversion of Water from the Meuse*, concluded that "principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals." *Diversion of Water from the Meuse (Neth. v. Belg.)* 1937 P.C.I.J. (ser. A/B) No. 70, at 76 (June 28). And Judge Sir Gerald Fitzmaurice concluded in his separate opinion in

Barcelona Traction that "[d]eciding a case on the basis of the rules of equity, that are part of the general system of law applicable, is something quite different from giving a decision *ex aequo et bono*." *Barcelona Traction*, 1970 I.C.J. 3, 85 (Feb. 5).

Similarly, "it is generally accepted that international law requires a minimum of fairness in the treatment of foreigners and foreign investment." Dolzer & Stevens, *supra*, at 58. For example, U.S. expert Professor Greenwood recently accepted that "customary international law" requires States "to maintain and make available to aliens, a *fair* and effective system of justice." *Loewen*, Second Greenwood Op. at 35 (emphasis added).

NAFTA tribunals, in the process of defining the precise content of Article 1105, have likewise noted the long-standing place held by the principles of fairness and equity in customary international law. The *S.D. Myers* Tribunal concluded that the "fair and equitable" standard "imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice." *S.D. Myers v. Canada* (Partial Award Nov. 13, 2000), ¶ 134; *see also* Daniel M. Price, *Investment, Sovereignty and Justice: Arbitration Under NAFTA Chapter Eleven*, 23 Hastings Int'l & Comp. L. Rev. 421, 423 (2000) (fair and equitable treatment is designed "to ensure a certain baseline level of protection that would require governments to act fairly, in good faith, and transparently in their relations with foreign investors.") (transcript of speech); *id.* at 424 ("The fair and equitable treatment standard is closely aligned with, and overlaps, certain fundamental principles of international law — including transparency, procedural fairness, and the duty of good faith — from which other, more specific rules emanate.")[12]

The *S.D. Myers* Tribunal recognized that the fair and equitable standard incorporates the anti-discrimination principle of customary international law. *S.D. Myers*, *supra*, ¶ 266. Mexico

[12] Like Mr. Aguilar Alvarez on behalf of Mexico, *supra*, Mr. Price was one of the U.S. officials who negotiated Chapter 11 of NAFTA, which gives his understanding of Chapter 11's provisions particular relevancy.

has, in its past NAFTA submissions, agreed that Article 1105 includes the principle of non-discrimination:

> The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests.

Metalclad, Mex. Outline of Argument ¶ 526 (quoting P. Muchlinski, *Multinational Enterprises and the Law* ¶ 2.3.1 (1995)); *see also Metalclad*, Mex. Counter-Mem. ¶ 841. Canada has accepted this concept as well, at least implicitly: In *S.D. Myers*, Canada argued that because the challenged measures were not discriminatory, they were perforce fair and equitable. *S.D. Myers*, Statement of Defense ¶ 47. The "fair and equitable treatment" requirement "connotes the principle of non-discrimination and proportionality in the treatment of foreign investors." Muchlinski, *supra*, ¶ 2.3.1. Moreover, the "general principles of law recognized by civilized nations" are an important source of "international law," Stat. of I.C.J., art. 38(1)(c), and every leading nation has prohibited invidious discrimination against foreigners. Indeed, "[t]he rule against discrimination . . . involves a principle which does not seem to have been challenged in any country or at any time." F.A. Mann, *Studies in International Law* 476 (1973).

In fact, the United States Supreme Court has repeatedly and expressly confirmed that equitable principles such as estoppel, clean hands, and fair dealing have long been part of international law. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 613, 622 (1983). In that case, the U.S. Supreme Court, "[a]pplying principles of equity common to international law and federal common law," and taking into account considerations of "'fair dealing'" and "the rights of third parties under international law," refused to recognize the corporate separateness of a Cuban trading company because the result would have been unjust. *Id.* at 628-34. Similarly, in *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955), the U.S. Supreme Court concluded that sovereign immunity, a principle of

customary international law,[13] was "not absolute, and that considerations of fair play must be taken into account in its application." *Id.* at 364. Accordingly, it held that "it seems only fair to subject a foreign sovereign" to set-off liability. *Id.* at 363.

There is thus no question that customary international law has long included the principles of fairness, equity, and due process, which are similar or in many respects identical to the Article 1105 requirements of "fair and equitable treatment" and "full protection and security."

C. Treaty Obligations are Part of "International Law"

Furthermore, the FTC "interpretation" provides little clarification regarding when independent treaty violations may also constitute Article 1105 violations. The "interpretation" simply states that a violation of another provision of NAFTA or of a provision of another treaty does not "establish" a violation of Article 1105. It in no way suggests, however, that Party conduct violating another provision of NAFTA or another treaty *cannot also* constitute treatment that violates Article 1105. (*See* Second Jennings Op. at 4.) As explained above, it was the original intent of the Parties negotiating NAFTA that Article 1105 would include the protections of both customary and conventional (*i.e.,* treaty) international law. (*See* Exhibit 2.) Thus, the "interpretation," taken on its own terms, does not preclude Article 1105 claims based on violations of other treaty obligations.

D. The FTC Could Have Adopted the United States Positions, But Did Not

It bears noting that the FTC did not adopt any of the relatively extreme litigating positions taken by the United States in this case. The United States has argued that the international "minimum standard" does not forbid misconduct that merely violates the allegedly "subjective" standards of fairness and equity. (Tr. at 248:4-10 (Mr. Legum on behalf of the United States asserting that "[a]llowing three individuals to make such decisions based only on

[13] "The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law." *Restatement, supra*, Ch. 5, "Immunity of States from Jurisdiction," Introductory Note.

their subjective and intuitive sense of what is fair or equitable would, we submit, be an extraordinary relinquishment of state sovereignty. It is one that cannot lightly be presumed and cannot be inferred from the text of 1105(1).").) The United States has argued that Article 1105 — in the context of this case — does nothing more than prohibit the same uncompensated expropriations independently barred under Article 1110. (*See* U.S. Mem. at 46.) And the United States has argued that Article 1105 requires *none* of the following: good faith,[14] non-discrimination,[15] and transparency.[16] *Compare* Price, *supra*, at 423, 424 (one of Chapter 11's negotiators asserting that "[t]he fair and equitable treatment standard is closely aligned with, and overlaps" the customary international law principles of "transparency, procedural fairness, and the duty of good faith"). The United States has asserted that violations of independent treaty obligations, such as the World Trade Organization treaties, *cannot* constitute violations of Article 1105. (U.S. Reply Mem. at 32.).

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[14] *See* Tr. at 251: 2-8 (Mr. Legum on behalf of the United States: "There is no obligation of good faith that applies to the treatment of property of aliens in international law that could serve as a foundation for a claim under Article 1105(1)."); *see also* U.S. Reply Mem. of April 12, 2001, at 30 ("no customary international law obligation of 'good faith' or 'reasonableness' applies to the subject California measures"); U.S. Rejoinder Mem. of June 27, 2001, at 25-28.

[15] *See* Tr. at 251: 13-14 (Mr. Legum on behalf of the United States, asserting with regard to the non-discrimination principle of customary international law "that it does not make sense to read such a prohibition in Article 1105(1)."); *see* U.S. Reply Mem. at 29 ("no general customary international law prohibition of nationality-based discrimination is incorporated into Article 1105(1)"); *id.* at 33-35; U.S. Rejoinder Mem. at 28-29.

[16] *See* Tr. at 256:15 to 257:1 (Mr. Legum on behalf of the United States, asserting that because the principle of transparency "is based exclusively on provisions elsewhere in the NAFTA and in the general agreement on tariffs and trade," which are not "specifically identified in Articles 1116(1) and 1117(1)," it is "not incorporated into Article 1105(1)"); *see* U.S. Rejoinder Mem. at 31 ("Article 1105(1) does not impose transparency or other procedural requirements"); *id.* at 33 ("there is no general requirement of 'transparency' in customary international law. . . . customary international law imposes no constraints on the process by which executive and legislative measures of general applicability . . . are adopted").

The United States has also taken the position in this case — and has asserted the agreement of Canada and Mexico on the point — that the phrase "relate to" in Article 1101, used to define the scope of Chapter 11, requires a "legally significant connection between the complained of measures and the specific investor who is the claimant, or its investment." (U.S. Reply Mem. at 44; *see also* U.S. Rejoinder Mem. at 45 ("the requirement that the measures at issue 'relate to' the claimant investor or its investments cannot be satisfied in the absence of a legally significant connection"); *id.* at 46 ("all three NAFTA Parties have observed [that] the term 'relating to' in Article 1101(1) may not properly be interpreted to mean merely 'affecting'"); Tr. at 315-18; *id.* at 528-29; U.S. Post-Hearing Subm. of 7/20/01 at 2-3.)

Prior to the FTC's July 31, 2001 "interpretation," all of these extreme U.S. litigating positions were already on record, but the FTC adopted none of them. The FTC "interpretation" is completely silent on the alleged "agreement" by the Parties that Article 1101's "relate to" language means "legally significant connection." It does not adopt the restrictive understanding of the international minimum standard that has been urged by the United States; for example, it nowhere suggests that Article 1105 protects only against uncompensated expropriations, or that this article allows investments to be treated "unfairly." Rather, it simply asserts that NAFTA's "fair and equitable treatment" and "full protection and security" requirements are part of that customary international law minimum standard. And the "interpretation" merely states that a breach of an independent treaty obligation does not "establish," *per se*, an Article 1105 violation.

The only fair inference, therefore, is that the members of the FTC could not or would not accede to the United States' litigating positions with respect to the meaning of "relate to" in Article 1101[17] or the substantive content of Article 1105. This failure to support the United States seriously undermines its positions.

[17] Methanex submits that it would be extremely appropriate for the Tribunal to draw such an inference, despite the existence of the superficial "closing provision" of the FTC's interpretation, which states that "[t]he adoption by the Free Trade Commission of this or any

III. If The July 31, 2001 Interpretation Is A Revision Of NAFTA, Then It Is Impermissible And Legally Ineffective

As noted above, while the meaning of the FTC "interpretation" is not entirely clear, it appears that it was intended to change NAFTA, not merely to "clarify" or "interpret" it. Thus, the United States has strongly suggested in its most recent (August 27, 2001) pleading in the *Loewen* case that the FTC interpretation effectively changed NAFTA by eliminating the overly "subjective and intuitive"[18] requirements of fair and equitable treatment and full protection and security. *See, e.g.*, *Loewen,* U.S. Rejoinder at 144-47; *Loewen,* Second Greenwood Op. at 40. Moreover, the U.S. Trade Representative (and member of the FTC), Robert Zoellick, has essentially claimed that the FTC's July 31, 2001 action changed the scope of NAFTA. According to press accounts, Mr. Zoellick has stated that the FTC's action "shows" that the Parties, when it comes to the terms of NAFTA, are "'not frozen on these issues,'" and that "the action shows that 'NAFTA [is] an active, growing, evolving structure.'" *E. Alden, International Economy — NAFTA deal changed to curb companies,* Financial Times*,* Aug. 1, 2001. As the title of the Financial Times story suggests, press accounts have similarly construed that portion of the FTC "interpretation" dealing with Article 1105 as *changing,* not merely interpreting, the provisions of NAFTA. Furthermore, the press accounts suggest that the "interpretation" was aimed at this proceeding, and was intended to "rein in" this Tribunal:

> Methanex, the world's largest producer of methanol, wants almost Dollars 1bn from the US government.
>
> In a tale of political intrigue and malfeasance, the Canadian company claims that Gray Davis, governor of California, banned the use of a methanol-based petrol additive in 1999 as a favour to

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future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement."

[18] *Loewen,* U.S. Rejoinder at 144, 145 (relevant portions attached as Exhibit 5). The United States has also referred to these protections as "subjective and intuitive" in this case. (Tr. at 248:4-10.)

> Archer Daniels Midland, the agribusiness giant that produces ethanol, a rival additive.
>
> . . . .
>
> The case is the most explosive one to appear before the controversial tribunals set up under the North American Free Trade Agreement, before which companies can sue any of the three Nafta governments directly if they believe their investments have been wrongfully expropriated.
>
> The procedure, known as Chapter 11, was seen as a model of investor protection when it was negotiated, but has become the most contentious element of the agreement. Trade critics argue that Chapter 11 has given corporations a powerful tool to override national regulations, threatening the sovereign right of governments to protect consumers and the environment.
>
> This week, however, the three governments decided to change the rules. Trade ministers from the U.S., Canada and Mexico agreed to *rein in* the tribunals by issuing a binding interpretation that will sharply narrow their ability to decide against the governments.
>
> In particular, the ministers have directed the panels to interpret narrowly clauses requiring "fair and equitable" treatment and "full protection and security."

International Economy — Pressure eased on NAFTA governments over investor protection, Financial Times, Aug. 2, 2001 (emphasis added).

It is clear that some parts of the United States government are unhappy with those NAFTA protections, and that the U.S. is thus considering making future investment treaties much narrower. For example, the United States is considering proposals to delete the fair and equitable and full protection and security protections from the text of the Free Trade Agreement of the Americas ("FTAA") — a treaty now being negotiated that would extend much of NAFTA to the American Southern Hemisphere. (*See* Letter of 8/30/01 to U.S. Trade Representative Robert B. Zoellick at 2, attached as Exhibit 6.) These proposed changes to the FTAA suggest that the real goal of the United States in orchestrating the FTC "interpretation" of Article 1105 was to eliminate retroactively the protections of "fair and equitable treatment" and "full

protection and security" expressly provided by NAFTA. However, the proposed FTAA changes also confirm that the only legally valid method of eliminating those NAFTA protections is through a formal amendment that actually deletes the pertinent treaty language from NAFTA.

If the FTC "interpretation" is a disguised attempt to eliminate the express protections of Article 1105, including the protections of independent treaty obligations, then it is quite clearly an amendment of NAFTA, not a mere interpretation. A critical distinction between interpretation and amendment is that "interpretation" simply pronounces the meaning of a text as it always was, while "amendment" changes the meaning of a treaty's terms. *See* [1964] II Y.B. Int'l Law Comm. 5, 55 (where subsequent practice in respect of a treaty "br[ings] about a change or development in the meaning of the treaty through a *revision* of its terms," that change may only be recognized "as an agreed revision but not as an interpretation of its original terms") (emphasis in original). Deleting NAFTA's express investment protections would be a drastic revision, and a substantial amendment to NAFTA.

Yet the FTC has no power of amendment or modification. *See* NAFTA Article 2001(2) & (3). It has only the power to "interpret" the provisions of NAFTA. *See* NAFTA Articles 1131(2); 2001(2)(c). In contrast, Article 2202(2), which deals with *amendments,* provides that "[w]hen 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."

This political process for *changing* NAFTA ensures that the rights of all affected parties will be respected. NAFTA, like many investment treaties, creates explicit protections for investors and their investments and allows them to control the prosecution of investment disputes arising from a Party's alleged breach of Chapter 11 guarantees. These rights can only be curtailed by the full exercise of the amendment process, involving the constitutional processes of all three countries, and not through a determination by the executive branches of the U.S., Mexico, and Canada that they wish to alter the scope of the investment protections in the treaty. This Tribunal should protect the distinction between amendment and interpretation so that

private parties that are not represented in the FTC discussions, and that are therefore unable to exercise democratic input into an amending process, are not deprived of vested rights.

Finally, if the FTC's "interpretation" is understood as an attempt to change the scope of Article 1105 *retroactively*, serious questions would arise as to whether the NAFTA Parties have interpreted Article 1105 "in good faith" by changing its originally-intended meaning in the midst of litigation. *See* Vienna Convention art. 31(1). Indeed, such an action should be viewed as an attempt by a party to an arbitration to "rein in" the Tribunal, and to impose upon it a change to the principal disputed terms to the benefit of that party. Such an action would usurp the function and authority of the Tribunal in the midst of an arbitral process that was designed to protect the rights of investors — rights enshrined in a treaty and accepted by the Parties. Coming at this late stage of the proceedings, retroactive amendment by fiat would be a breach of the most elementary notions of due process, and would be utterly incompatible with the regime of independent, impartial arbitration that the Parties themselves created in NAFTA Chapter 11.

As Sir Robert Jennings puts it:

> It would be wrong to discuss these three-Party 'interpretations' of what have become key words of this arbitration, without protesting the impropriety of the three governments making such an intervention well into the process of arbitration, not only after the benefit of seeing the written pleadings of the parties but also virtually prompted by them. In the present case, without even asking for leave, one of the actual Parties to the arbitration has quite evidently organized a démarch intended to apply pressure on the tribunal to find in a certain direction by amending the treaty to curtail investor protections. This is surely against the most elementary rules of the due process of justice. The phrase due process is itself of United States origin and has become international (*see* NAFTA Article 1110) because the United States has for so long been regarded as the guardian of due process. It is very sad to see this present betrayal of principles of which the United States has long been the revered author and practitioner.

(Second Jennings Op. at 4-5.)

IV. Methanex Remains Entitled To The Level of Protection Guaranteed By The Most-Favored-Nation Provision Of Article 1103

Even if the FTC had the power to amend NAFTA and restrict its protections (which it of course does not), and even if the FTC statement actually has that effect (which it does not actually purport to do), Methanex would still be entitled to the free-standing protections of "fair and equitable treatment" and "full protection and security" through the application of NAFTA's most-favored-nation provision, Article 1103. That Article states:

> 1. Each Party shall accord to investors of another Party treatment *no less favorable* than that it accords, in like circumstances, to investors of any other Party *or of a non-Party* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment *no less favorable* than that it accords, in like circumstances, to investments of investors of any other Party *or of a non-Party* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

NAFTA art. 1103(1)-(2) (emphasis added). Under the explicit terms of Article 1103, Methanex is entitled to treatment no less favorable than that the United States accords to any other foreign investor, NAFTA or otherwise.

Several bilateral investment treaties to which the United States is a party guarantee other countries' investments "full protection and security" and "fair and equitable treatment," without the limits that the United States insists the FTC "interpretation" imposes. For example, the bilateral investment treaty between the United States and Argentina provides:

> Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, Art. II (2)(a). Similarly, the bilateral investment treaty between the United States and Tunisia provides that:

> Investment shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Treaty with Tunisia Concerning the Reciprocal Encouragement and Protection of Investment, May 15, 1990, Art. II(3), *entered into force,* Feb. 7, 1993.[19] Thus, to the extent that the investors of, *e.g.,* Argentina and Tunisia are entitled to "fair and equitable treatment" and "full protection and security" under treaty provisions that by their terms provide protection beyond the customary international minimum standard, Canadian (and Mexican) investors are entitled to the same treatment under NAFTA's most-favored-nation provision.

V. The Role of This Tribunal Remains Unchanged

Accordingly, taking the FTC's "interpretation" of Article 1105 at face value, this Tribunal's role is unchanged. Article 1105 *expressly* requires "fair and equitable treatment" and "full protection and security," and all the protections of both conventional and customary international law. The FTC simply lacks the power to reduce or narrow these protections. Therefore, this Tribunal — now, as before — must determine, based on all the facts and

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[19] Nowhere in the Letters of Transmittal or Letters of Submittal for these two bilateral investment treaties did the United States identify the "fair and equitable treatment" or "full protection and security" standards as limited to customary international law, or as incorporating only the international minimum standard. In fact, the United States construed these provisions just as Methanex does:

> The treaty is fully consistent with U.S. policy toward international investment. A specific tenet, reflected in this treaty, is that U.S. investment abroad and foreign investment in the United States should receive fair, equitable, and nondiscriminatory treatment.

Treaty with Argentina, *supra*, Letter of Transmittal from President George H.W. Bush to Senate of the United States, Jan. 19, 1993.

circumstances, whether the United States and California accorded Claimant's investments fair and equitable treatment and full protection and security, and whether California's actions otherwise violated international law, giving those terms their ordinary meaning. This is the only conceivable, good-faith understanding of the text of Article 1105 and of the FTC's July 31, 2001 interpretation of that article.

Respectfully submitted,

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Enclosures

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