

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 POST-HEARING SUBMISSION**

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*
Alan J. Birnbaum
Andrea J. Menaker
*Attorney-Advisers, Office of International
Claims and Investment Disputes*
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

July 27, 2001

CONTENTS

I. THE NAFTA PARTIES' SUBSEQUENT AGREEMENT REGARDING THE INTERPRETATION OF THE NAFTA MUST BE TAKEN INTO ACCOUNT	1
II. UNDER <i>OIL PLATFORMS</i> , METHANEX' CLAIMS SHOULD BE DISMISSED AT THIS PRELIMINARY STAGE	6
CONCLUSION.....	10

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 POST-HEARING SUBMISSION**

In accordance with the Tribunal's order at the close of the hearing on jurisdiction, admissibility and the proposed amendment on July 13, 2001, the United States respectfully submits this response to Methanex's post-hearing submission dated July 20, 2001 (the "Methanex Submission").

**I. THE NAFTA PARTIES' SUBSEQUENT AGREEMENT REGARDING THE
INTERPRETATION OF THE NAFTA MUST BE TAKEN INTO ACCOUNT**

The United States has demonstrated that there is, among all of the NAFTA Parties, subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention on two points: that Article 1105(1) requires only that the Parties accord the customary international law minimum standard of treatment, in which "fair and equitable treatment" and "full protection and security" are subsumed, and that a measure must do

more than merely affect an investor or investment to fall within the scope of Chapter Eleven as defined by Article 1101(1). *See* U.S. Post-Hearing Submission at 2-3 & nn. 2-3.¹ Methanex’s contentions to the contrary are without merit.

First, the plain terms of the Vienna Convention provide no support for Methanex’s position that “the Tribunal should give no weight to the supposed agreement.” Methanex Submission at 2. Article 31 requires the Tribunal to interpret “the terms of the treaty in their context and in the light of its object and purpose.” VCLT art. 31(1). As Article 31 makes clear, the Tribunal *must* also take into account, “together with the context,” any subsequent agreement within the meaning of Article 31(3). By contrast, Article 32 precludes recourse to any other means of interpreting the treaty – including the treaty’s preparatory work or views of scholars such as Sir Robert Jennings or Sir Ian Sinclair – except for two specific purposes. Those purposes are to confirm the meaning resulting from the application of Article 31, or to determine the meaning *if* reference to the sources collected in Article 31 “[l]eaves the meaning ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable.” Article 32 thus confirms that subsequent agreement under Article 31(3) is authoritative.²

¹ Methanex’s argument that the NAFTA Parties’ positions on other issues are inconsistent thus misstates the United States’ position. *See* Methanex Submission at 5-9. The United States has maintained that there is agreement among the NAFTA Parties only as to the two issues described above. The United States does not contend, and has not contended, that the NAFTA Parties’ submissions before this Tribunal establish “subsequent agreement” on any other point.

² Contrary to Methanex’s suggestion, the United States has never contended that a subsequent agreement on interpretation is “binding” in the same manner that a subsequent treaty would be. Methanex Submission at 1-2. Subsequent *treaties* are governed by Article 30 of the Vienna Convention, which provides specific rules addressing the application of successive treaties relating to the same subject-matter. Article 31(3)(a), by addressing “any subsequent *agreement* between the parties regarding the interpretation of the treaty or the application of its provisions,” plainly uses the term “agreement” in a sense broader than that of the term “treaty” as defined in the Vienna Convention.

Second, there is no support for Methanex's suggestion that, to evidence "subsequent agreement" under Article 31(3)(a), a treaty party must state not only that it agrees with the other party, but also that its statements "constitute an agreement." Methanex Submission at 2. No requirement as to form appears in the text of the Article. The plain meaning of the Article requires that "*any* subsequent agreement" be taken into account. Methanex offers no rationale or authority for imposing an additional, unstated requirement that a party expressing subsequent agreement must acknowledge that it is, indeed, agreement pursuant to Article 31(3)(a). Such an unstated requirement would serve no purpose and cannot be reconciled with the Article's text.

Third, Methanex's suggestion that the statements by the United States in these proceedings concerning the interpretation of the NAFTA are not authorized under municipal law is incorrect. As a preliminary matter, Article 31(3) addresses "agreement," and not a "treaty." Treaties, unlike agreements, are subject to the full-powers and other requirements of Part II of the Vienna Convention. *Compare* VCLT art. 31(3)(a) (referring simply to "subsequent agreement" without reference to Part II) *with id.* art. 39 ("A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."). In addition, Methanex's presumption that there can be no agreement here because the United States Trade Representative has lead responsibility for negotiating trade agreements is simply wrong. The United States Department of State represents the

United States of America in this proceeding.³ The written and oral statements that it makes in this proceeding represent the position of the United States Government.

Fourth, as Methanex concedes, the Free Trade Commission's authority to issue interpretations of the NAFTA is not exclusive. *See* Methanex Submission at 5 n.1. There is no merit to Methanex's suggestion that the Tribunal should draw a negative inference from the fact that the NAFTA Parties did not expressly prescribe that submissions pursuant to NAFTA Article 1128 could result in "subsequent agreement" within Vienna Convention Article 31(3)(a). *Id.* at 5. Article 31 sets forth rules of interpretation that have been accepted as customary international law; the terms of the Article need not be spelled out in a treaty for those rules to apply.

Fifth, Methanex's contention that Article 31(3)(a) requires a formal agreement (*id.* at 10-14) is without merit for the reasons stated in the United States' Post-Hearing Submission (at 3-4). The additional authorities Methanex offers here do not dictate otherwise. The two GATT cases cited by Methanex are inapposite. As the passages cited by Methanex make clear, in those cases agreement among *all* parties to the treaty was lacking; the agreements did not concern interpretation; and the agreements were formed not subsequent but *prior to* the conclusion of the treaty which was to be interpreted.⁴

Here, in contrast, all three Parties to the NAFTA are plainly in agreement concerning the

³ *See* UNCITRAL Arbitration Rules art. 4 (setting forth procedure for identifying representatives of party for purposes of arbitration proceedings); Letter, dated June 29, 2000, from Mark A. Clodfelter to Tribunal (identifying representatives of United States pursuant to Article 4 of the UNCITRAL rules).

⁴ *See United States-Restrictions on Imports of Tuna*, DS29/R, 1994 WL 907620, at *57 ¶ 5.19 (June 16, 1994) ("the agreements cited by the parties to the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement, and . . . they did not apply to the interpretation of the General Agreement or the application of its provisions. Indeed, many of the treaties referred to could not have done so, since they were concluded prior to the negotiation of the General Agreement."); *see also Canada-Term of Patent Protection*, WT/DS170/R, 2000 WL 631059, at *32 n.49 (May 5, 2000) (quoting text just quoted from *Restrictions on Imports of Tuna*).

interpretation of the NAFTA and that agreement postdates the NAFTA itself. Similarly, although Methanex acknowledges that an exchange of notes may constitute agreement within Article 31(3)(a), Methanex Submission at 13 (citing *Soci t  Ruegger et Boutet v. Soci t  Weber et Howard*), Methanex provides no rationale for distinguishing between parallel, separate statements made in diplomatic notes that signify agreement among the parties to a treaty and parallel, separate statements made in written submissions to an arbitral tribunal. No principled distinction between such statements can be drawn.⁵

Finally, for the reasons set forth in the United States' Post-Hearing Submission (at 4-5), the general rule is that interpretations of treaties *do* apply retroactively. Methanex's contention to the contrary based on Article 28 of the Vienna Convention misses the point. *See* Methanex Submission at 15. Article 28 addresses the effect of *treaty* provisions; it has no application to agreements that merely clarify what a treaty provision has always meant. For this same reason, there is no merit to Methanex's suggestion that the Tribunal should disregard the NAFTA Parties' agreement as to the interpretation because it does not accord with Methanex's own expansive reading of the relevant provisions – and, thereby, supposedly “cut[s] back the investor protections contained in NAFTA's text.” Methanex Submission at 18. Methanex's argument presumes that its interpretation of Article 1105(1) is the correct interpretation and that the United States' interpretation

⁵ Methanex's recourse to a statement made by Sierra Leone's representative to the 1968 session of the U.N. Conference on the Law of Treaties is equally unavailing. Methanex Submission at 11. The statement made by that representative suggesting that the text of Article 31(3)(a) be revised to provide that only written agreements fall within the scope of Article 31(3)(a) was rejected. No such requirement is reflected in the present Article. Nevertheless, the United States notes that the agreement at issue in this case is, in fact, evidenced in written submissions. In addition, Methanex states incorrectly that the observation made by the German representative to the Conference noted in the United States' submission was made after the text of Article 31(3)(a) was approved. Methanex Submission at 11. Those statements were made at the thirteenth plenary meeting of the full Conference, after Article 31 was approved by the International Law Commission

therefore “cut[s] back the investor protections” in that Article. That merely begs the question, however. The United States contends that its interpretation of Article 1105(1) is correct. The other NAFTA Parties agree. The Parties’ agreement as to this interpretation neither expands nor restricts investors’ rights, but, instead, clarifies what rights have always been contained in Article 1105(1). In any event, Article 31(3) does not vary the authoritative nature of subsequent agreement depending on whether it expands or contracts protections of States or their nationals.

II. UNDER *OIL PLATFORMS*, METHANEX’ CLAIMS SHOULD BE DISMISSED AT THIS PRELIMINARY STAGE

Methanex agrees that in *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803 (Dec. 12), the Court held that “at the jurisdictional stage it was necessary . . . to issue definitive interpretations of disputed treaty provisions[,]” in order to reach “final conclusions on whether the alleged violations ‘do or do not fall within the provisions of the Treaty.’” Methanex Submission at 22 (quoting *Oil Platforms* at 810 ¶ 16). Furthermore, Methanex agrees that Judge Higgins’ approach corresponds with that embraced by the Court. *Id.* at 22, 25 (“If the Tribunal adopts the ‘definitive’ approach of the ICJ and Judge Higgins in *Oil Platforms* . . .”). Despite this, Methanex now “considers Judge Shahabuddeen’s [approach] more appropriate.” *Id.* at 24.

As interpreted by Methanex (*id.* at 23), Judge Shahabuddeen’s approach to jurisdictional objections made at a preliminary phase conflicts not only with *Oil Platforms*, but also, as noted in the United States’ Post-Hearing Submission (at 7), with

and the Committee of the Whole, but *before* the Article was approved at the Conference by 97 votes to none.

Methanex's own position that dismissal is required if the factual basis for the claim is not credibly alleged. For the reasons stated in the United States' Post-Hearing Submission, the *Oil Platform* approach should be applied by this Tribunal. Pursuant to that approach, Methanex's claims should be dismissed in the pending preliminary phase of this arbitration.

Moreover, Judge Shahabuddeen's approach focuses on the text of the specific compromissory clauses at issue. *See Oil Platforms*, 1996 I.C.J. at 830 (separate opinion of Judge Shahabuddeen) (In determining which I.C.J. test on jurisdiction should be followed, "[t]he solution is to be found in returning to the terms of the compromissory clause."). Accordingly, if this Tribunal were to apply Judge Shahabuddeen's approach, it would be required definitively to interpret, at this preliminary phase, the compromissory clauses – *i.e.*, Articles 1101(1), 1116(1) and 1117(1) – at issue here, and just as Judge Shahabuddeen definitively determined the meaning of the phrase "any dispute," this Tribunal would be required definitively to determine the meaning of the phrases "relating to," "by reason of, or arising out of," and "loss or damage," and would be required definitively to determine what constitutes a "breach" of the Chapter Eleven obligations – *i.e.*, those embodied in Articles 1102, 1105(1) and 1110 – at issue. Thus, for the reasons explained in the United States' prior submissions and at the hearing, even under Judge Shahabuddeen's approach, dismissal would be compelled under the carefully delimited compromissory clauses set forth in Articles 1101(1), 1116(1) and 1117(1).⁶

⁶ In the I.C.J. precedents on which Judge Shahabuddeen relied, the Court's jurisdiction was based on compulsory jurisdiction declarations or compromissory clauses that are fundamentally distinct from, and much broader than, those of NAFTA Chapter Eleven. *See Ambatielos (Greece v. U.K.)*, 1953 I.C.J. 10, 14-15 (May 19) (clause provided for jurisdiction over "any controversies which may arise respecting the interpretation or the execution of the present Treaty"); *Judgements of the Administrative Tribunal of the*

Finally, Methanex misconstrues certain statements of the *Oil Platforms* Court in suggesting that any arguable construction of the treaty can serve as a basis for jurisdiction. Methanex Submission at 25. Specifically, Methanex relies on the statement that “the *possibility must be entertained* that it [*i.e.*, freedom of commerce] could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their storage with a view to export.” *Oil Platforms*, 1996 I.C.J. at 819 ¶ 50 (emphasis as supplied by Methanex). Methanex also relies on the statement that “[o]n the material now before the Court, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil; it notes nonetheless that their destruction was *capable of having such an effect* and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by” the treaty. *Id.* at 820 ¶ 51 (emphasis as supplied by Methanex).

These statements show only that, because the Court identified credibly alleged facts that, if shown to be true, could give rise to a treaty violation, it denied the relevant preliminary objection. Therefore, these statements are completely consistent with the

ILO Upon Complaints Made Against Unesco, 1956 I.C.J. 77, 78 (Oct. 23) (clause provided for jurisdiction “[i]n any case in which the Executive Board of an international organization . . . challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed”); *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 14-15 (Mar. 21) (clause provided for jurisdiction “in all legal disputes hereafter arising” concerning, among other matters, “the interpretation of a treaty” and “[a]ny question of international law”); *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1984 I.C.J. 392, 427 (Nov. 26) (jurisdiction based on same clause as in *Interhandel* and clause providing for jurisdiction over “[a]ny dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy”). As the Court recognized in *South West Africa (Eth. v. S. Afr.; Lib. v. S. Afr.)*, compromissory clauses such as these call for a very different analysis than those, like Articles 1116(1) and 1117(1), that condition jurisdiction on breach and loss: “If the Court considered that these requirements [of establishing a dispute as to interpretation or application of an agreement] were satisfied, it could assume jurisdiction to hear and determine the merits without going into the question of the Applicants’ legal right or interest relative to the subject-matter of their claim; for the jurisdictional clause did not, according to its terms, require them to establish the existence of such a right or interest for the purpose of founding the competence of the Court.” 1966 I.C.J.

United States' argument that dismissal is appropriate where, as here, the uncontested and assumed facts cannot, as a matter of law, establish the jurisdictional prerequisites to a claim under Chapter Eleven.⁷

Thus, under the approach to preliminary objections of *Oil Platforms* – and that of both Judges Higgins and Shahabuddeen – this Tribunal would be required at this preliminary phase to interpret the terms of Articles 1101(1), 1116(1) and 1117(1) and, in so doing, to construe what, as a matter of law, can constitute a breach of Articles 1102, 1105(1) and 1110. Under either approach, the Tribunal would then apply those interpretations to the uncontested and credibly alleged facts to determine whether Methanex's claims survive the United States' preliminary objections. For the reasons explained in the United States' memorials and at the hearing, under either approach, Methanex's claims should be dismissed at this preliminary phase on jurisdictional and admissibility grounds.⁸

6, 38 ¶ 60 (July 18); *see also id.* at 37 ¶ 60 (“The faculty of invoking a jurisdictional clause depends upon what tests or conditions of the right to do so are laid down by the clause itself.”).

⁷ Methanex similarly misconstrues certain statements of Judge Higgins, including her statement that “[t]he only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is . . . to see if on the basis of Iran's claims of fact there *could* occur a violation of one or more of them.” *Oil Platforms* at 856 ¶ 32 (separate opinion of Judge Higgins) (emphasis added). Also, Methanex misconstrues Judge Higgins' statement that “[t]he Court should thus see if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles.” *Id.* at 856 ¶ 33. Judge Higgins analysis is entirely consistent with the United States' argument that, on the basis of the facts assumed and uncontested, there *could not* be jurisdiction, and Methanex *cannot*, as a matter of law, show a “breach,” “loss or damage,” or any of the other jurisdictional requirements of Articles 1101(1), 1116(1) or 1117(1).

⁸ Methanex states in a footnote that the United States conceded at the hearing that “if an investor credibly alleges that a measure intentionally discriminates, ‘then the measure “relates to” the foreign-owned investor or investments.’” Methanex Submission at 6 n.2 (quoting Hearing Tr. at 531:11-12). The full quotation is as follows: “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. However, if such an allegation is not a credible allegation, then it can't survive a preliminary challenge to admissibility.” Hearing Tr. at 531:8-15. In other words, the position of the United States on intent and the “relating to” requirement is as follows: a measure “relates to” a claimant investor or its investments if the NAFTA Party intended to harm that specific claimant or its investments or a relevant class of which that claimant or its

CONCLUSION

For the foregoing reasons, the United States respectfully submits that both Article 31(3)(a) of the Vienna Convention on the Law of Treaties and the International Court of Justice's decision in *Oil Platforms* support dismissal of Methanex's claims.

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*

Alan J. Birnbaum

Andrea J. Menaker

*Attorney-Advisers, Office of International
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

July 27, 2001

investments are members. Thus, in this case, intent would be relevant with respect to the "relating to" requirement if California adopted the subject measures with the intent of harming, specifically, Methanex or its investments because they are foreign-owned or, generally, foreign-owned methanol producers or marketers. As the United States noted in its written submissions and at the hearing, Methanex has not credibly alleged any such intent. *See* U.S. Reply at 16-17; U.S. Rejoinder at 6-7; Hearing Tr. at 301:20-306:7; Hearing Tr. at 520:19-526:10.