TABLE OF CONTENTS

CHAPTER A -

THE DISPUTING PARTIES AND OTHER PERSONS

1. ***Methanex***: The Claimant is Methanex Corporation (*"Methanex"*), a company originally incorporated under the laws of Alberta, Canada. It is now formed under the Canadian Business Corporations Act. Methanex produces and markets methanol, with facilities in Canada, the USA, New Zealand, Chile and Trinidad & Tobago. Its headquarters are in Vancouver, British Columbia, Canada.

2. ***Methanex-US***: Methanex Methanol Company (*"Methanex-US"*) is a general partnership formed under the laws of Texas, USA. Its partners are Methanex Inc. and Methanex Gulf Coast Inc., both incorporated under the laws of Delaware, USA. Methanex owns, indirectly, all the shares of these two US companies and thereby, also indirectly, Methanex-US.

3. ***Methanex-Fortier***: Methanex Fortier Inc. (*"Methanex-Fortier"*) is a company incorporated under the laws of Delaware, USA. Methanex owns, indirectly, all the shares in this US company.

4. ***The United States of America***: The Respondent is the USA which, along with Canada and Mexico, is one of the three Parties to the North American Free Trade Agreement ("NAFTA").

CHAPTER B -

THE ARBITRATION TRIBUNAL

5. ***The Three Arbitrators****:* The Arbitration Tribunal comprises (i) William Rowley of McMillan Binch, Royal Bank Plaza Suite 3800, South Tower, Toronto, Ontario M5J 2J7, Canada, having been appointed by Methanex; (ii) Warren Christopher of O'Melveny & Myers LLP, 1999 Avenue of the Stars, Los Angeles, California 90067-6035, USA, having been appointed by the USA; and (iii) V. V. Veeder of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, England, having been appointed as third arbitrator and president of the Tribunal.

6. ***The Tribunal's Secretaries***: The Tribunal's legal secretaries were Sri Srinivasan (until August 2001), Samuel Wordsworth and (from June 2002) Jeremy Maltby.

7. ***Administrative Secretary:*** The Tribunal's administrative secretary was Margrete Stevens, Senior Counsel, ICSID, World Bank, Washington DC.

CHAPTER C -

THE ARBITRAL PROCEDURE

(1) Introduction

8. For reasons that are self-evident to the Disputing Parties and that will become clear below, it is necessary to set out at length part of the procedural history of these arbitration proceedings. It is particularly necessary to describe the steps leading to the reformulation of Methanex's claim in its draft Amended Statement of Claim of February 2001. (To distinguish between Methanex's successive cases, the terms "Original Statement of Claim" and "Amended Statement of Claim" are used in this Award). It is not however necessary to repeat here other procedural aspects of these proceedings, including the Tribunal's earlier decisions on the place of arbitration and on the admission of *amici curiae* to these arbitration proceedings[1].

9. For ease of reference, relevant provisions of NAFTA (in the English language version) are set out in the annex to this Award, together with provisions of the UNCITRAL Arbitration Rules.

[1] These decisions were delivered by the Tribunal to the Disputing Parties, Canada and Mexico (as NAFTA Parties); and, along with certain other materials in these arbitration proceedings, both decisions have since been published (but not by the Tribunal) on the worldwide web: e.g. www.naftalaw.org and www.state.gov/s/l/c3439.htm

(2) Notice of Arbitration

10. On 3rd December 1999, Methanex served its Notice of Arbitration, accompanied by its Original Statement of Claim. Pursuant to Article 3(2) of the UNCITRAL Rules and Article 1137(1) NAFTA, the arbitral proceedings were deemed to have commenced on the USA's receipt of the Notice of Arbitration, i.e. 3rd December 1999.

(3) Original Statement of Claim

11. As formulated in its Original Statement of Claim, Methanex's claim is based on the alleged breach of two provisions in Section A of Chapter 11 of NAFTA: (i) the State of California did not accord a minimum standard of treatment as required by Article 1105(1) NAFTA; and (ii) various actions taken by the State of California and its Governor directly or indirectly constitute a measure tantamount to expropriation under Article 1110(1) NAFTA. Methanex's original claim was brought under Article 1116(1) NAFTA only.

(4) Amended Statement of Claim

12. On 12th February 2001, Methanex submitted a draft Amended Statement of Claim. This added a new claim of discrimination on the basis of nationality as prohibited by Article 1102 NAFTA, as well as further claims for breaches of Articles 1105 and 1110 NAFTA, with these claims now being brought pursuant to Articles 1116 and 1117 NAFTA.

(5) Waiver and Article 1121(1) NAFTA

13. Pursuant to Article 1121(1) NAFTA, Methanex appended to its Notice of Arbitration a consent to arbitration and waiver dated 2nd December 1999. The USA disputed the validity of the waiver. However at the oral hearing in July 2001, as discussed further in Chapter H below, the Disputing Parties resolved the issue of waiver by agreement. Accordingly, the Tribunal is not required to rule on the issue of the waiver's validity; and it does not do so in this Award.

(6) The USA's Defence and Jurisdictional Challenges

14. In its Statement of Defence of 10th August 2000, the USA raised a series of objections to jurisdiction and admissibility in respect of Methanex's Original Statement of Claim. In accordance with the timetable laid down at the Second Procedural Meeting held on 7th September 2000, the USA submitted a Memorial on Jurisdiction and Admissibility on 13th November 2000. It was the first of many submissions which raised substantial objections to Methanex's claims, quite apart from the USA's denial of the merits of those claims.

(7) Pre-Hearing Written Submissions on Challenges

15. Prior to the oral hearing of July 2001, in accordance with the Tribunal's orders of 7th September

2000, 22nd December 2000, 8th January, 27th February, and 2nd May 2001, the Disputing Parties submitted written submissions on jurisdiction and admissibility, including Methanex's application to amend its Original Statement of Claim in the form of its Amended Statement of Claim. It is convenient to list these submissions below, given that reference will be made to them later in this Award, together with written submissions made by Canada and Mexico as NAFTA Parties pursuant to Article 1128 NAFTA:

13th November 2000: USA Memorial on Jurisdiction and Admissibility. Also on 13th November 2000, Methanex and USA Joint Submission of Evidence, Vol 1.

12th January 2001: Methanex Motion to Amend its Original Statement of Claim pursuant to Article 20 of the UNCITRAL Arbitration Rules, together with a Draft Outline of its Amended Statement of Claim.

12th February 2001: Methanex Counter-Memorial on Jurisdiction and Draft Amended Statement of Claim.

12th April 2001: USA Reply Memorial on Jurisdiction and Proposed Amendment.

30th April 2001: Second Submission of Canada under Article 1128 NAFTA, addressing certain jurisdictional issues.

15th May 2001: Mexico Submission under Article 1128 NAFTA also addressing certain jurisdictional issues.

25th May 2001: Methanex Rejoinder Memorial on Jurisdiction and its Proposed Amendment.

27th June 2001: USA Rejoinder Memorial on Jurisdiction and the Proposed Amendment.

(8) Jurisdictional Hearing of July 2001

16. The oral hearing on the USA's challenges to jurisdiction, admissibility and related issues on Methanex's amendment took place at the World Bank, Washington DC, on 11th to 13th July 2001. The Disputing Parties and Parties were represented as follows:

(I) *Methanex*: As Counsel, Christopher F. Dugan, Esq., James A. Wilderotter, Esq., Melissa D. Stear, Esq., Nancy M. Kim, Esq., all of Jones, Day, Reavis & Pogue, 51 Louisiana Avenue NW, Washington, DC 20001-2113, USA;

(II) *The USA*: As Counsel, Ronald J. Bettauer, Esq., Mark A. Clodfelter, Esq., Barton Legum, Esq., Andrea J. Menaker, Esq., Alan Birnbaum, Esq., all of the U.S. Department of State, Office of the Legal Adviser, Suite 203, South Building 2430 E Street NW Washington, DC 20037-2800, USA;

(III) *Canada*: As Counsel, Mr Boris Ulèhla, Counsel, Trade Law Division, Department of Foreign Affairs and International Trade, Department of Justice, 125 Sussex Drive, Ottawa, Ontario K1A 0G2, Canada; and

(IV) *Mexico*: As Counsel, Adriana González Arce Brilanti Esq., Secretariat of the Economy, Alfonso Reyes No. 30, Piso 17, Col Condesa, 06179, Mexico DF, Mexico; and Nancy Fisher, Esq., of Shaw Pittman, 3200 N Street NW, Washington DC 20037-1128, USA.

In addition, each Disputing Party was attended by other persons whose names are recorded in the files and need not be repeated here, including (for the USA) representatives from the US Department of State, the Office of the US Trade Representative, the US Department of Commerce, the US Department of Justice, the US Department of Treasury, the US Department of Labor, the US Enviromental Protection Agency, the California Environmental Protection Agency and the California State Water Resources Control Board.

17. No witness or expert witness testified at this oral hearing; and indeed no factual evidence on any disputed issue was adduced by any Disputant Party or Party. As appears below, it was a hearing limited to legal argument, based on alleged and assumed facts.

(9) Post-Hearing Written Submissions on Challenges

18. Following the oral hearing, the Tribunal received further written submissions on jurisdiction and admissibility:

20th July 2001: Methanex Post-Hearing Submissions.

20th July 2001: USA Post-Hearing Submissions.

27th July 2001: Methanex Reply to Post-Hearing Submissions of the USA.

27th July 2001: USA Response to Post-Hearing Submissions of Methanex.

31st July 2001: USA Letter attaching Interpretation issued by the NAFTA Free Trade Commission (see further below).

18th September 2001: Methanex Letter in Response to the NAFTA Free Trade Commission Interpretation.

26th October 2001: USA Response to Methanex's Submission concerning the NAFTA Free Trade Commission Interpretation.

11th November 2001: Methanex's Reply to the USA Response to Methanex's Submission concerning the NAFTA Free Trade Commission Interpretation.

21st November 2001: Letter of Mexico concerning the Methanex Reply Submission of 11th November 2001.

17th December 2001: USA Rejoinder to Methanex's Reply Submission concerning the NAFTA Free Trade Commission Interpretation.

8th February 2002: Third Submission of Canada pursuant to NAFTA Article 1128.

11th February 2002: Mexico's further submission under NAFTA Article 1128.

By order dated 11th March 2002, having previously intimated its intentions by order dated 28th November 2001, the Tribunal closed the file on any further written submissions relating to jurisdiction and admissibility, unless previously requested by the Tribunal; none were so requested.; and the file was formally closed by letter dated 25th July 2002.

19. It is readily apparent from the list of these written submissions alone, quite apart from the oral hearing itself, that neither Disputing Party left any stone unturned in support of its own case; and in a document such as this, it is not possible for us to pay sufficient tribute to the enormous industry and legal scholarship required for such detailed, lengthy and learned submissions. Fortunately, however, it appears that these submissions lie in the public domain for future reference, along with the helpful submissions of Canada and Mexico as NAFTA Parties[2].

(10) The NAFTA Free Trade Commission Interpretation

[2] See (inter alia) the web-sites at footnote 1, *supra*.

20. As noted above, after the oral hearing, the USA submitted a copy of the Interpretation issued by the NAFTA Free Trade Commission. Pursuant to this document dated 31st July 2001 and signed by the representatives of Canada, Mexico and the USA, the NAFTA Free Trade Commission adopted certain *"interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions*".

21. Part A of the Interpretation concerns "Access to documents". It is not relevant for present purposes. Part B concerns Article 1105(1) NAFTA. It is relevant to the USA's challenges; and accordingly we set out below its relevant terms:

> *"B. Minimum Standard of Treatment in Accordance with International Law*
>
> *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 minimum 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).*
>
> *Closing Provision*
>
> *The adoption by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement."*

This document had not been expressly foreshadowed in the USA's argument taking place at the oral hearing earlier that same month; but in the light of Methanex's submissions on Article 1105 NAFTA, it is possible that the timing was not a complete coincidence.

CHAPTER D -

THE DISPUTE: METHANEX'S SUCCESSIVE CLAIMS

(1) Introduction

22. In summary, Methanex's claim is brought in relation to the production and sale of a methanol-based source of octane and oxygenate for gasoline which is known as methyl tertiary-butyl ether ("MTBE"). It complains against US measures taken by the State of California restricting the use of MTBE in gasoline in California. It is convenient to set out the essential characteristics of the claim, both in Methanex's Original Statement of Claim and Methanex's Amended Statement of Claim.

(2) Methanol, MTBE and Methanex

23. As stated, MTBE is a methanol-based source of octane and oxygenate for gasoline. As a product, MTBE competes with ethanol. Ethanol is also a source of octane and oxygenate for gasoline, generally manufactured from biomass feedstocks such as corn. A major US producer of ethanol is a US company called Archer Daniels Midland, or "ADM".

24. Methanex does not produce or sell MTBE or ethanol. Methanex's business is the production, transportation and marketing of methanol. Methanol is a liquid petrochemical made from feedstocks containing carbon and hydrogen; and it is used to produce MTBE (but not ethanol).

Approximately one third of Methanex's methanol production is directed at the fuel sector, principally for use in methanol-based MTBE.

(3) The US Measures

25. For the purposes of Article 1101 NAFTA, the measures adopted or maintained by the USA are alleged by Methanex in its Original Statement of Claim to be the 1997 California Bill and the 1999 California Executive Order.

26. ***(i) The California Bill***: The California Senate adopted Bill 521 on 9th October 1997. In summary, the Bill allocated funds for the University of California to conduct an assessment of the human health and environmental risks and benefits associated with the use of MTBE.

27. Section 2 of the California Bill provided:

> "*The Legislature hereby finds and declares that the purpose of this act is to provide the public and the Legislature with a thorough and objective evaluation of the human health and environmental risks and benefits, if any, of the use of methyl tertiary-butyl ether (MTBE), as compared to ethyl tertiary-butyl ether (ETBE), tertiary amyl methyl ether (TAME) and ethanol, in gasoline, and to ensure that the air, water quality, and soil impacts of the use of MTBE are fully mitigated*."

28. The California Bill appropriated US $500,000 to the University of California to conduct this evaluation, involving not only MTBE but also (inter alia) ethanol. Methanex and methanol do not appear, expressly, in the California Bill.

29. ***(ii) The California Executive Order***: The Executive Order D-5-99 of the Governor of California of 25th March 1999 recorded that there was a significant risk to the environment from using MTBE in gasoline in California. The Governor was then (and remains) Gray Davis, who was elected Governor of California on 3rd November 1998. Prior to his election as Governor, Gray Davis was Lieutenant Governor of California.

30. The California Executive Order provided (inter alia):

> "*The California Energy Commission (CEC), in consultation with the California Air Resources Board, shall develop a timetable by July 1, 1999 for the removal of MTBE from gasoline at the earliest possible date, but not later than 31st December 2002*." (Paragraph 4)
>
> "*The California Air Resources Board and the State Water Resources Control Board shall conduct an environmental fate and transport analysis of ethanol in air, surface water, and groundwater. The Office of Environmental Health Hazard Assessment shall prepare an analysis of the health risks of ethanol in gasoline...*" (Paragraph 10)
>
> "*The California Energy Commission (CEC) shall evaluate by December 31, 1999 and report to the Governor and the Secretary for Environmental Protection the potential for development of a California waste based or other biomass ethanol industry. CEC shall evaluate what steps, if any, would be appropriate to foster waste based or other biomass ethanol development in California should ethanol be found to be an acceptable substitute for MTBE*." (Paragraph 11)

31. In addition, the California Executive Order (paragraph 7) required that gasoline containing MTBE

be labelled prominently at the pump to enable consumers to make an informed choice on the type of gasoline they purchase. Similarly, Methanex and methanol do not appear, expressly, in the California Executive Order.

32. The US measures for the purposes of Article 1101 NAFTA, as alleged in the Amended Statement of Claim, are the California Executive Order, described above, and the CaRFG3 Regulations, described below. (Methanex no longer seeks to rely on the California Bill).

33. ***(iii) The California Regulations***: The CaRFG3 Regulations implemented the California Executive Order: Cal. Code Regs. Tit. 13 §§ 2273 came into force on 16th December 1999, requiring gasoline pumps containing MTBE to be labelled in California as follows: "*Contains MTBE. The State of California has determined that use of this chemical presents a significant risk to the environment*." Cal. Code Regs. Tit. 13 §§ 2260 et seq came into force on 2nd September 2000. In particular, §§ 2262.6 provided at sub-section (a)(1) that: "*Starting December 31, 2002, no person shall sell, offer for sale, supply or offer for supply California gasoline which has been produced with the use of methyl tertiary-butyl ether (MTBE)*".

34. Similarly, Methanex and methanol do not appear, expressly, in the California Regulations. We shall return below to a more detailed analysis of these three measures.

(4) Breaches of Articles 1102, 1105 and 1110 NAFTA

35. The claim, as formulated in Methanex's Original Statement of Claim, alleged that the US measures were (*inter alia*) arbitrary and based on a process lacking substantive fairness, penalised only one component of gasoline, and went far beyond what was necessary to protect any legitimate public interest. Methanex pleaded that the USA was in breach of Articles 1105 and 1110 and, with its Amended Statement of Claim, it added a breach of Article 1102 NAFTA based on discrimination.

36. ***Article 1105:*** As to Article 1105 NAFTA, Methanex alleged that California failed to accord to Methanex-US treatment in accordance with international law, including fair and equitable treatment (Paragraph 34 of the Original Statement of Claim).

37. ***Article 1110:*** As to Article 1110 NAFTA, Methanex alleged that the US measures would end the business of Methanex-US in selling methanol for use in MTBE in California, would contribute to the extended closure of the Fortier plant, and would therefore constitute a substantial taking of the Methanex-US and Methanex-Fortier business and of Methanex's investment in those companies (Paragraph 35 of the Original Statement of Claim).

38. ***Article 1102:*** As to Article 1102 NAFTA, Methanex alleged in the Amended Statement of Claim that the US measures were measures of intentional discrimination, being defined as an intent to discriminate against methanol and MTBE to the benefit of the "domestic ethanol industry" (Page 1, footnote 1 of the Amended Statement of Claim).

(5) Article 1116 NAFTA

39. In its Original Statement of Claim, Methanex advanced its claims under Article 1116 NAFTA "*Claim by an Investor of a Party on Its Own Behalf*". Methanex therefore claims as an investor of a NAFTA Party (Canada) that another NAFTA Party (the USA) has breached an obligation under Section A of Chapter 11 (Articles 1105 and 1110 NAFTA), and that Methanex has "*incurred loss or damage by reason of, or arising out of, that breach*".

40. The loss and damage alleged in the Original Statement of Claim is pleaded by Methanex as follows:

(I) *"Loss to Methanex, Methanex US and Fortier of a substantial portion of their customer base, goodwill and market for methanol in California and elsewhere;*

(II) Losses to Methanex, Methanex US and Fortier as a result of the decline in the global price of methanol;

(III) Loss of return to Methanex, Methanex US and Fortier on capital investments they have made in developing and serving the MTBE market;

(IV) Loss to Methanex due to the increased cost of capital;

(V) Loss to Methanex of a substantial amount of its investment in Methanex US and Fortier."

41. As already stated, the claim as formulated by Methanex in its Original Statement of Claim was brought only under Article 1116 NAFTA, without relying on Article 1117 NAFTA.

(6) Article 1117 NAFTA

42. Methanex's Amended Statement of Claim also alleges that Methanex satisfies all the elements for a claim advanced under Article 1117 NAFTA "*Claim by an Investor of a Party on Behalf of an Enterprise*".

43. Methanex claims here as an investor of a NAFTA Party (Canada), that Methanex indirectly owns and controls Methanex-US and Methanex-Fortier which are US enterprises, that another NAFTA Party (the USA) has breached obligations under Section A of Chapter 11 (Articles 1102, 1105 and 1110 NAFTA), and that Methanex-US and Methanex-Fortier have "*suffered grave damage as a result of those breaches*" (Amended Statement of Claim, page 71). It is self-evident that

the form of this claim is juridically different from the Original Statement of Claim, although the particulars of loss as originally pleaded by Methanex are not factually dissimilar.

CHAPTER E -

THE DISPUTE: METHANEX'S ASSUMED FACTS

(1) Introduction

44. As already stated, the Tribunal has so far heard no testimony or other evidence; it has determined no disputed issue of fact; and in this Award it makes no finding of fact. In particular, the Tribunal has heard no evidence from the Governor of California, the California legislature, California state officials or ADM. For the legal reasons explained below, the factual materials recited in this chapter are taken necessarily from the facts alleged by Methanex, albeit disputed as facts by the USA.

45. Accordingly, these materials can be *only* assumed facts for the purpose *only* of the Tribunal's decision in this Award on the USA's challenges on jurisdiction and admissibility - and nothing more. Given that the legal burden of proving its disputed factual allegations remains to be discharged by Methanex, together with the legal presumptions of innocence and the legal doctrine of omnia praesumuntur rite esse acta, nothing in our recital of factual materials below should be taken as casting the slightest shadow over the targets of Methanex's allegations. Nor should this Award indicate any conclusions held by the Tribunal as to the eventual proof of these assumed facts because we have formed *no* view at all as to their merits, one way or the other.

(2) Methanex's Factual Allegations

46. In brief, Methanex's factual case, as set out in its Amended Statement of Claim, alleges that the US measures constitute a disguised trade and investment restriction intended to achieve the improper goal of protecting and advantaging the domestic ethanol industry through sham environmental regulations disadvantaging MTBE and methanol (Amended Statement of Claim, page 53). Methanex's case is built up with a series of factual allegations, supplemented by other factual allegations advanced in its other written and oral submissions to the Tribunal, which can be summarised as follows:

47. ***MTBE***: MTBE is a safe, effective and economic component of gasoline (Amended Statement of Claim, page 7). Its use has been approved and encouraged by the US Federal Government after exhaustive study (Amended Statement of Claim, page 56).

48. ***European Union:*** Regulatory agencies in the European Union, including the European Commission, have determined that it is not appropriate or environmentally beneficial to ban MTBE (Amended Statement of Claim, page 34).

49. ***Methanol:*** Methanol is a feedstock for MTBE. In 1998, Methanex shipped approximately 132,000 tons of methanol to California refineries for MTBE production (Amended Statement of Claim, pages 4-5). Methanex supplies the vast majority of methanol in California (Rejoinder of 25th May 2001, page 27). California has no methanol industry of its own (Transcript, Day 3, pages 400 and 403).

50. ***Ethanol:*** Ethanol is a fuel and an oxygenate that competes directly with MTBE. Using ethanol as a gasoline oxygenate may be environmentally harmful; and its use is not energy efficient. Ethanol may be harmful to human health; and it is, in contrast to MTBE, a carcinogen (Amended Statement of Claim, pages 10-11).

51. ***US Ethanol Industry:*** The production of ethanol is heavily subsidised by United States Federal and State Governments. The US ethanol industry is a powerful political lobby that is constantly seeking legislative and other measures granting higher subsidies and better protection from competition against alternative fuels and oxygenates. Political campaign contributions are a central element of the ethanol industry's lobbying program (Amended Statement of Claim, page 7).

52. ***ADM:*** ADM produces more than 70% of US ethanol. ADM is the force that drives the ethanol industry's lobbying machine. ADM has launched a systematic political attack on MTBE and methanol with a view to removing MTBE from the market so that ethanol can take its place. To this end, ADM has advanced two consistent themes: (i) methanol and MTBE are "foreign" products, and any increased use of MTBE increases US reliance on "foreign" energy imports; and (ii) methanol and MTBE are health hazards (Amended Statement of Claim, pages 12-13).

53. ***ADM Strategy:*** Political contributions and lobbying are the foundation of ADM's business strategy (Amended Statement of Claim, page 21). Its lobbying and political contributions have been the prime mover in creating the heavily protected ethanol industry in the USA. Public officials have repeatedly and explicitly adopted ADM's program, supporting a ban on MTBE in order to increase US ethanol production (Amended Statement of Claim, pages 22-23). Governmental officials in the United States who support the ethanol industry almost always cast their support in terms of improper protectionist intent (Transcript, Day 3, p. 392). ADM has even engaged in criminal activity to pursue its interests (Amended Claim, page 24).

54. ***True Solution:*** California's drinking water problem is principally caused by leaking underground storage gasoline tanks. Accordingly, the obvious and reasonable solution is not to ban MTBE, but to stop gasoline leakages (Amended Statement of Claim, page 24). California State officials are criticised for not addressing promptly contamination resulting from leaking underground storage tanks (Amended Statement of Claim, page 26).

55. ***MTBE as Indicator***: MTBE in groundwater often travels more quickly than other gasoline components; and it is detectable at extremely low threshold levels. It is thus an early indicator of gasoline leaks. In the mid-1990s, trace amounts of MTBE began to appear in some sources of California's drinking water (Amended Statement of Claim, page 28).

56. ***ADM's Opportunity:*** California's contaminated groundwater presented ADM with a golden opportunity to eliminate competition. It did so through its favourite competitive methods: misleading publicity and massive political contributions. As a result of ADM's years of publicly characterising MTBE and methanol as dangerous foreign products, California officials were already receptive to ADM's tactics (Amended Statement of Claim, page 28).

57. ***California Bill 521:*** Rather than cure the problem of leaking underground storage tanks, the Californian response to the problem of gasoline leakage was punitive action against one of the early symptoms of leaking tanks, i.e. to set in motion a process to ban the use of MTBE in gasoline. On 9th October 1997, Bill 521 was passed appropriating funds to the University of California for a study on risks associated with the use of MTBE, including a comparative study of the risks of MTBE's competitors, including ethanol (Amended Statement of Claim, page 29).

58. ***First Contribution:*** On 2nd June 1998, ADM made a contribution of US $5,000 to the Gray Davis gubernatorial campaign in California (Amended Statement Claim, page 29).

59. ***The Secret Meeting:*** On 4th August 1998, Mr Davis flew on an ADM plane to a secret meeting with ADM at its headquarters in Illinois (Amended Statement of Claim, pages 29-30). This meeting took place at a critical time in the development of California's oxygenate policy. At the time when it was held, the meeting was deliberately kept secret; and the participants still continue to deny the true subject-matter of their meeting. The meeting was never disclosed by either Mr

Davis' California state office or his campaign organisation.

60. In fact, the trip to Illinois was recorded on campaign finance filings as a meeting with labour representatives in Chicago, as a studied attempt to hide the trip from public scrutiny. ADM has now said, falsely, that the meeting was a 'get acquainted session'. This is contradicted by the responsibilities and job titles of the ADM representatives who attended. As the Wall Street Journal reported on 30th March 2001, those who attended *"were mostly tied to the ethanol industry*" (Rejoinder of 25th May 2001, pages 8-10). ADM's characterisation is also contradicted by the draft agenda for the meeting, from which it may be inferred that the purpose of the meeting was to discuss ethanol (Transcript, Day 3, pp. 480-486).

(This draft agenda has not been seen by the Tribunal; and Methanex has yet to tender the document into evidence).

61. It would have been extraordinary if ADM had not emphasised to its guest, as a candidate running for the office of Governor of California, what ADM had stated publicly on many occasions, namely that methanol and MTBE were "foreign" products and that banning MTBE would be a patriotic step to reduce US dependence on such products (Amended Statement of Claim, page 20). Later, once elected, Governor Davis acted on what ADM told him during this meeting (Transcript, Day 1, p. 160).

62. ***Second and Third Contributions:*** On 19th August 1998, ADM made a contribution of US $100,000 to the Gray Davis gubernatorial campaign. Within the next four months, a further US $55,000 was paid to the Davis campaign (Amended Statement of Claim, page 30).

63. ***The UC Study:*** On 12th November 1998, the University of California completed its study, pursuant to California Bill 521. The study failed in significant ways to meet the requirements of

the Bill, omitting the required comparative study of the risks of MTBE's competitors (Amended Statement of Claim, page 30).

64. ***California Executive Order:*** On 25th March 1999, seven months after the meeting on 4th August 1998, Governor Davis made the California Executive Order effectively banning MTBE after 2002 and requiring MTBE to be labelled at gasoline pumps. The Order also began the process of developing an ethanol industry based in California (Amended Statement of Claim, page 32).

65. ***Fourth Contribution:*** Following this Order, but long after the gubernatorial campaign had come to an end, ADM paid a further US $55,000 to Governor Davis. The four contributions totalled US $215,000. This amount put ADM in the top 1% of Governor Davis' contributors - despite the fact that ADM then had minimal business interests in California (Amended Statement of Claim, page 30).

66. ***Cal Regs:*** Regulations implementing the labelling requirement and prohibiting the use of MTBE in gasoline went into effect respectively on 16th December 1999 and 2nd September 2000. These regulations also prohibited the use of any gasoline oxygenate other than ethanol unless California's Environmental Policy Council determined that use of that oxygenate would not present a significant risk to public health or the environment (Amended Statement of Claim, pages 32-33).

67. ***Governor Davis:*** The information and political contributions received by Governor Davis from ADM misled and improperly affected his decision about leaking tanks and MTBE. ADM promoted the ban on MTBE at its secret meeting with Governor Davis. That meeting led to the large political contributions thereafter. The MTBE measures were at least in part the result of the Governor's political debt to ADM and of his desires to protect and favour ADM, to establish a California based ethanol industry and to penalise producers of MTBE and methanol, the

"dangerous" and "foreign" MTBE feedstock (Amended Statement of Claim, page 53).

68. ***State of California:*** California officials also perceived methanol and MTBE as "foreign" products. They were improperly motivated by that perception, and by an intent to promote and protect the California and US ethanol industries (Rejoinder of 25th May 2001, page 27). The measures were intended to discriminate against Methanex and its investments as "foreign" competitors of the highly protected domestic ethanol industry (Amended Statement of Claim, page 66).

69. ***Intent:*** In its Rejoinder of 25th May 2001 (page 26), Methanex characterises its factual allegations as follows: "*Methanex has alleged, and it is certainly reasonable for the Tribunal to infer, that when ADM executives secretly met with Governor Davis, they repeated their usual protectionist arguments. Methanex has also alleged that ADM urged the MTBE ban in order to protect the US ethanol industry. Finally, Methanex has alleged that Governor Davis acted at least in part on the basis of those arguments...*". In its Reply Submission of 27th July 2001 (page 9), Methanex refers to its "*allegation that Gov. Davis intended to benefit the US ethanol industry and to penalise foreign producers of methanol and MTBE*".

70. ***Disclaimer:*** As Methanex has made clear, it does *not* allege that Governor Davis, officials of the State of California or ADM violated US or California campaign contribution statutes or US criminal law (Amended Statement of Claim, footnote 2; and Transcript, Day 3, p. 487).

(3) The California Executive Order dated 14th March 2002

71. For the sake of completeness, the Disputing Parties forwarded to the Tribunal, without substantive comment, Executive Order D-52-02 made by the Governor of the State of California on 14th

March 2002. Given that it may qualify the effect of the California Executive Order of 25th March 1999, it is appropriate to quote here its terms in full:

> *"WHEREAS, Executive Order D-5-99, issued March 25, 1999, found that, "on balance," use of MTBE posed a significant risk to California's environment. The State Energy Resource Conservation and Development Commission (Commission) and the Air Resources Board (Board) were directed to develop a timetable for removing MTBE from gasoline at the earliest possible date, no later than December 31, 2002. The Board was directed to adopt regulations as needed to implement the Executive Order; and*
>
> *WHEREAS, on December 9, 1999, the Board adopted regulations prohibiting the sale of gasoline containing MTBE in California after December 31, 2002; and*
>
> *WHEREAS, Senate Bill 989 (Sher) of 1999 requires the Commission to develop a timetable for removal of MTBE from gasoline "at the earliest possible date" that will still ensure adequate supply and availability of gasoline. (Health & Saf. Code §43013.1.); and*
>
> *WHEREAS, in order to comply with the federal requirements and also eliminate use of MTBE, California would need to import up to 900 million gallons of ethanol per year; and*
>
> *WHEREAS, the current production, transportation and distribution of ethanol is insufficient to allow California to meet federal requirements and eliminate use of MTBE on January 1, 2003; and*
>
> *WHEREAS, on June 12, 2001, the U.S. Environmental Protection Agency denied California's request for a waiver of the federal oxygen content requirement. As a result, if use of MTBE is prohibited January 1, 2003, California's motorists will face severe shortages of gasoline, resulting in substantial price increases; and*
>
> *WHEREAS, strengthened underground storage tank requirements and enforcement have significantly decreased the volume and rate of MTBE discharges since Executive Order D-5-99 was issued in March of 1999;*

NOW, THEREFORE, I, GRAY DAVIS, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

I FIND that it is not possible to eliminate use of MTBE on January 1, 2003, without significantly risking disruption of the availability of gasoline in California. This would substantially increase prices, harm California's economy and impose an unjustified burden upon our motorists.

IT IS ORDERED that by July 31, 2002, the board shall take the necessary actions to postpone for one year the prohibitions of the use of MTBE and other specified oxygenates in California gasoline, and the related requirements for California Phase 3 reformulated gasoline.

IT IS FURTHER ORDERED that the Board and Commission shall work with the petroleum industry to ensure that MTBE-free gasoline meeting California standards continues to be supplied to the Lake Tahoe region and any other areas of California currently receiving MTBE-free gasoline.

IT IS FURTHER ORDERED that the State Water Resources Control Board and the Department of Health Services shall work with California drinking water providers to ensure that the providers continue to take all appropriate measures to prevent discharge of MTBE into surface water reservoirs."

(For reasons that appear below, it proved unnecessary for the Tribunal's decisions in this Award to require the Disputing Parties to make any submissions on this new document. In regard to the next stages of these arbitration proceedings, the Tribunal may allow further submissions to be made as to the relevance and effect of both this document and the other documents to which it refers, in particular the US Environmental Protection Agency's decision of 12th June 2001).

CHAPTER F -

METHANEX'S APPLICATION TO AMEND

(1) Introduction

72. On 30th November 2000, Methanex served a Notice of Change of Legal Counsel and Intent to File an Amended Claim, alongside a Notice of Intent to Submit a Complaint to Arbitration. It was indicated that Methanex would add a specific claim of discrimination on the basis of nationality under Article 1102 NAFTA. On 22nd December 2000, Methanex gave written notice of its intention to amend its claim to include additional claims in relation to breaches of Articles 1102, 1105 and 1110 NAFTA, with the claim now being advanced under both Articles 1116 and 1117 NAFTA. On 12th January 2001 Methanex submitted its Motion to Amend its Original Statement of Claim pursuant to Article 20 of the UNCITRAL Arbitration Rules and its Draft Outline of Amended Claim; and on 12th February 2001 Methanex submitted its Draft Amended Statement of Claim.

73. Methanex's application substantially modified the legal and factual basis of its claim; and it much affected the conduct and progress of these arbitration proceedings, including the scope of the USA's existing challenges on jurisdiction and admissibility made in response to Methanex's Original Statement of Claim. The USA opposed Methanex's attempt to modify its claim.

(2) The Grounds for Methanex's Application

74. Methanex makes its application to amend the claim on the basis of Article 20 of the UNCITRAL Arbitration Rules. This provides:

> *"During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or the separate arbitration agreement."*

75. It is said by Methanex that, under Article 20 of the UNCITRAL Arbitration Rules, parties have the right to amend if the amendment is not frivolous or vexatious, if the amendment has not been unduly delayed, and if the amendment will not cause prejudice to the other party. Methanex contends that none of these criteria are met in the present case. It is also said that the amendment raises serious allegations concerning the fairness and equity of the measures at issue; and that, although additional legal theories and facts now fall to be considered, the underlying complaint is unchanged and the arbitration will not be unduly disrupted. Methanex further contends that the alternative to amendment, namely filing the amended claim separately and seeking consolidation pursuant to Article 1126 NAFTA, would be markedly less efficient.

(3) The USA's Response

76. The USA resists the amendment on the basis that it amounts to a new claim: the amendment identifies an entirely new measure (the CaRFG3 regulations); it is based on new facts; and it adds new legal theories for recovery; i.e. a national treatment claim under Article 1102 and a substantially different claim under Article 1105. The USA contends that international tribunals applying the UNCITRAL Arbitration Rules have disallowed claims in such circumstances. It is argued that there has here been a delay in seeking to make the amendment and a failure to substantiate the assertion that the claim is based on newly discovered facts. In particular, it is said that there has been no explanation as to how and when it was discovered by Methanex that the allegedly secret meeting of 4th August 1998 had taken place. It is noted that the use of an ADM plane was disclosed on Governor Davis' campaign disclosure forms. It is also said that the bulk of Methanex's new allegations are based on public materials available years ago.

77. The USA also contends that to allow the amendment, after a briefing schedule had already been set with which the USA had complied, would cause the USA prejudice. However, the USA accepted, rightly, that the amendment would cause it no irremediable prejudice; or at least no prejudice which could not be financially compensated by an order from the Tribunal that Methanex bear the USA's wasted costs caused by the amendment.

(4) The Tribunal's Decision

78. At the jurisdictional hearing of July 2001, the Tribunal ordered that: *"Subject to all jurisdiction and admissibility issues and subject to any order as to costs, the Tribunal will allow the Claimant to amend its Statement of Claim in the form of the draft Amended Statement of Claim"* (Transcript, Day 2, p. 339). In short, apart from the jurisdiction and admissibility issues, the Tribunal decided, in principle, that Methanex should be allowed to amend its Original Statement of Claim in the form of its Amended Statement of Claim, subject to an order that Methanex should ultimately bear, regardless of the result of the arbitration on the eventual merits of its claim, the wasted costs of the arbitration thrown away by its amendment (including the legal costs of the USA assessed in a reasonable sum). In the Tribunal's view, subject to recovering such costs, the USA would suffer no unfair prejudice from such an amendment; and the overall interests of fairness and procedural efficiency would have supported an order allowing Methanex to amend its claim, as requested.

79. However, as is clear from the Tribunal's order of July 2001, Methanex's application to amend its pleading was subject to the Tribunal's decision on the USA's challenges on jurisdiction and admissibility, to which we turn below. We there decide that Methanex's Amended Statement of Claim, *as a whole*, cannot withstand the USA's jurisdictional challenge based on Article 1101; but that it is possible that a fresh pleading from Methanex re-stating part of its existing case could survive that challenge. For these reasons, we cannot here make an order allowing Methanex to amend its claim to the full extent of its Amended Statement of Claim; and we decline to do so. (We make it plain, however, that applying Article 20 of the UNCITRAL Arbitration Rules, Methanex may include in a fresh pleading reliance on Article 1117 NAFTA, in addition to Article 1116 NAFTA).

CHAPTER G -
METHANEX'S REQUEST FOR
DOCUMENTARY DISCLOSURE

80. In the light of the decisions made in this Award, we do not think it necessary here to make any order on Methanex's application for documentary production, raised by Methanex's letter of 1st May 2001, at the jurisdictional hearing of July 2001 (Transcript, Day 1, page 130 *et seq.*), and expanded by Methanex's letter of 24th September 2001. Such documentation was not relevant to the decisions in this Award; and if relevant to the future conduct of these arbitration proceedings, a like application can be renewed by Methanex against the USA.

81. We take the view, subject to hearing further argument in relation to a specific application, that we have no general power to order Canada and Mexico as NAFTA Parties to produce any documentation to Methanex in these arbitration proceedings. We also take the view that we have a discretion to impose conditions on any documentary production by the USA, relating to confidentiality and the limited use of the documents.

CHAPTER H -
THE USA'S CHALLENGES ON JURISDICTION AND ADMISSIBILITY

(1) Introduction

82. The USA's challenges on jurisdiction and admissibility were formally set out in the USA's Memorial on Jurisdiction and Admissibility of 13th November 2000. The respective positions of the Disputing Parties were then developed with an extensive series of submissions made in writing as well as orally, such submissions addressing both Methanex's claim as pleaded in the Original Statement of Claim and as re-pleaded in the Amended Statement of Claim. The Disputing Parties made submissions addressing not only the individual challenges raised by the USA but also the general approach for the Tribunal, at this jurisdictional stage, towards disputed issues of fact and legal interpretation.

83. In this Award, the Tribunal does not address each and every submission made by the Disputing Parties, as well as Canada and Mexico as NAFTA Parties. For the Tribunal's decisions, as appears below, it is unnecessary to decide each submission; and it would be quite wrong for us to do so, given that these arbitration proceedings will continue and may require a decision on many of these submissions later.

(2) The USA's Challenges

84. It is however necessary to list the several challenges made by the USA to indicate what the Tribunal has and has not addressed in this Award:

Challenge I: Article 1116(1) NAFTA (No proximate cause);
Challenge II: Articles 1105 & 1110 NAFTA (No legal right impugned by US measures);
Challenge III: Article 1101(1) NAFTA (No legally significant connection between US measures and Methanex or its investments);
Challenge IV: Article 1116(1) NAFTA (No loss);
Challenge V: Article 1116(1) NAFTA (No claim for subsidiaries' losses);
Challenge VI: Article 1121(b) NAFTA (No waiver); and
Challenge VII: Article 1102 NAFTA (No possible claim).

85. ***Challenge I:*** The USA's first objection is based on Article 1116 NAFTA, characterised as requiring that the alleged breach be the proximate cause of the alleged loss. We decide that this particular challenge cannot succeed for several cumulative reasons.

86. First, as a general principle explained in Chapter I below, we cannot address it as a challenge based on "admissibility". Second, as a jurisdictional challenge, it fails on the wording of Article 1116(1) because it is an indisputable fact that Methanex has made "a claim ... that [Methanex] has incurred loss and damage"; and, in our view, the plain meaning of this provision does not require, as a jurisdictional matter, the claimant to prove loss and damage. Third, even if it qualified as a jurisdictional challenge (which in our view, it does not), its legal merits are so intertwined with factual issues arising from Methanex's case that we would have been minded, as a matter of discretion, to join that challenge to the merits under Article 21(4) of the UNCITRAL Arbitration Rules. (This procedure is discussed in Chapter K below).

87. ***Challenge II:*** The USA's second objection is that Methanex has no legal right infringed by the measures under Article 1110 and 1105(1) NAFTA. As to the former provision, it is contended that Methanex has failed to identify an "investment" that could be expropriated; and a customer base or goodwill cannot qualify as an investment under Article 1139(g)&(h) NAFTA; an expectation of future profits from methanol sales cannot constitute an investment; and expectations are not property rights capable of expropriation. As to the latter provision, it is contended that Methanex has failed to identify any legal right to the allegedly denied standard of treatment; and this claim is therefore also inadmissible.

88. We decide that this particular challenge also cannot succeed for several reasons. As with Challenge I, we cannot address it as a challenge based on "admissibility"; it does not qualify as a jurisdictional challenge; and even if it did qualify as a jurisdictional challenge (which in our view, it does not), it is so intertwined with factual issues in Methanex's case that we would have been minded to join that challenge to the merits.

89. ***Challenge III:*** We address and decide the USA's third objection in the succeeding chapters of this Award.

90. ***Challenge IV:*** The USA's fourth objection is that Methanex has not suffered and could not in any event suffer any loss as a result of the measures, as required by Article 1116 NAFTA, because Methanex relies on an alleged ban of MTBE, whereas neither the California Bill nor the California Executive Order effected such a ban. As with Challenge I, the same comments applies to this challenge: i.e. it fails in principle as a challenge on admissibility; it fails as a jurisdictional challenge on the plain meaning of the words in Article 1116(1) NAFTA; and even if it qualified as a jurisdictional objection, it would be joined to the merits.

91. ***Challenge V:*** The USA's fifth objection in its Memorial is that there is under Article 1116(1) NAFTA no possible claim by an investor made in its own right for alleged injuries to an enterprise owned or controlled by that investor: Article 1116(1) allows only claims for loss or damage incurred by an investor (whereas Article 1117 provides for claims for loss or damage to an enterprise owned or controlled by an investor). Losses suffered by Methanex-US and Methanex-Fortier could only be claimed under Article 1117, which was not pleaded in Methanex's Original Statement of Claim; and Methanex has otherwise suffered no loss that could be claimed under Article 1116, the pleaded losses being derivative of losses suffered by Methanex's subsidiaries.

92. We decide that this challenge cannot succeed for several cumulative reasons. First, it is moot. As appears below under the USA's Challenge III, we decide that there is no jurisdiction to decide Methanex's claim as advanced in its Original Statement of Claim; and it is therefore unnecessary for us here to decide the USA' further submissions based on Article 1116, limited to that particular pleading. Second, the jurisdictional challenge is technical and capable of being cured by Methanex's reliance on Article 1117. Indeed, Methanex does now rely upon Article 1117 in its Amended Statement of Claim; Methanex asserts that any defect in its original pleading (which is denied) would be cured if this particular amendment were allowed by the Tribunal; and as indicated in Chapter F above, we are sympathetic to Methanex's reliance on Article 1117 in a fresh pleading. Third, with Methanex introducing Article 1117 into its case, any new jurisdictional dispute over Articles 1116 and/or 1117 can be joined to the merits on the grounds of procedural efficiency.

93. ***Challenge VI***: As already indicated above, Challenge VI (waiver) was amicably settled by the Disputing Parties at the hearing in July 2001, as recorded by letter dated 13th July 2001 to the Tribunal signed for Methanex by Christopher F. Dugan Esq and James A. Wilderotter Esq and for the USA by Barton Legum Esq, as Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes of the US State Department. Its material terms provide:

"The parties have agreed to the following resolution of the United States' preliminary objection based on the adequacy of the waivers submitted by Claimant Methanex Corporation pursuant to NAFTA Article 1121:

1. Although it continues to maintain that the other waivers submitted by Methanex do not comply with the Article's requirements, Respondent United States of America agrees that the waivers submitted by Methanex on May 25, 2001 satisfy the requirements of Article 1121;

2. Although it continues to maintain that the waivers it previously submitted complied with the Article's requirements, Methanex does not now claim in this proceeding that California Senate Bill 521 is a measure that violates the NAFTA;

3. The parties agree that waivers complying with the requirements of Article 1121 must be submitted as provided in Article 1137, in order for a claim under Chapter Eleven of the NAFTA to be considered submitted to arbitration and jointly request that the Tribunal note this agreement in its decision on the United States' preliminary objections;

4. In consideration of the foregoing, the United States hereby withdraws its objection to the Tribunal's jurisdiction based on the adequacy of the waivers provided by Methanex pursuant to Article 1121."

In these circumstances, the issue having been so agreed by the Disputing Parties, it requires no decision or other action from the Tribunal, save to record (as requested) the terms of their agreement in this Award.

94. ***Challenge VII:*** The USA submits that Methanex's claim pleaded in its Amended Statement of Claim fails to allege, as required by Article 1102, that Methanex or its investments were treated differently from any US producer or marketer of methanol; that Methanex could make no such allegation because the USA is home to one of the largest methanol industries in the world; that the measures accord precisely the same treatment to all investors in the methanol industry, whether owned or controlled by domestic US or foreign investors; that Article 1102 does not oblige the

USA as a NAFTA Party to treat all products equally, requiring only treatment that is not less favourable with respect to investors of other NAFTA Parties and their investments that are in like circumstances with their US counterparts; and that ethanol and methanol are different products with different properties and uses. As with Challenge II, the same comment applies to Challenge VII: i.e. it fails in principle as a challenge on admissibility; and even if it had qualified as a jurisdictional challenge, we would have joined it to the merits.

95. ***Conclusion:*** We therefore dismiss each of the USA's Challenges I, II, IV, V and VII; we decide Challenge III later in this Award; and we are not required to decide Challenge VI. As regards Challenges I, II, IV, V and VII, we decide nothing else in this Award as to their underlying legal merits; and to that extent both the USA and Methanex shall remain free to maintain their legal submissions in these arbitration proceedings. Accordingly, it could not be suggested that the Disputing Parties' efforts have been wasted in advancing their extensive submissions on these issues. The exact opposite is true: in the light of the factual evidence still to be adduced in these arbitration proceedings, it may be necessary for the Tribunal to address and decide many of these submissions at a later stage of this arbitration; and we trust that in this regard the research and the written work have been largely completed by the Disputing Parties and will require no repetition.

CHAPTER I -
JURISDICTION:
THE TRIBUNAL'S GENERAL APPROACH

(1) Introduction

96. In this chapter, the Tribunal seeks to identify the general approach required to address the several issues on jurisdiction and admissibility raised by the Disputing Parties. The Tribunal's decision has to be made at an early stage of the arbitration; there has been no trial on the merits of Methanex's claim; and as we have already stressed several times, no evidence on any disputed issue has yet been adduced at all by either Disputing Party. It is convenient to begin with general principles.

(2) The 1969 Vienna Convention

97. ***Article 31(1):*** The first general principle relates to the interpretation of the NAFTA provisions at issue. As was common ground between the Disputing Parties, each provision was to 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*", in accordance with customary international law rules reflected in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

98. Article 31(1) of the Vienna Convention (previously article 27(1) of the draft convention) comprises three separate principles, as noted in the International Law Commission's Commentary to its Final Draft Articles:

> *"The first - interpretation in good faith - flows directly from the rule pacta sunt servanda. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose. These principles have repeatedly been affirmed by the Court [i.e. the ICJ].*[3]"

99. As to the second of these principles (interpretation in accordance with the ordinary meaning of a term), various commentators have noted that this is not merely an exercise in uncovering the mere literal meaning of a term[4]. As to the third principle of Article 31(1), the Special Rapporteur of the International Law Commission noted: "*the 'ordinary meaning' of terms cannot properly be determined without reference to their context and to the objects and purposes of the treaty*"[5].

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[3] *Yearbook of the International Law Commission*, 1966, Vol. II. Commentary to draft article 27 at para.12.

[4] For example, see Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., 1984, at p.121. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953 at p.114.

[5] Referring to the 1964 report of the International Law Commission: *Yearbook of the International Law Commission*, 1966, Vol. II, at p. 95.

100. In accordance with Article 1131(1) NAFTA and Article 33(1) of the UNCITRAL Arbitration Rules, we have sought to apply these general principles to the interpretation of the disputed provisions at issue, both in NAFTA and the UNCITRAL Arbitration Rules.

101. ***Article 31(3):*** Article 31(3) of the Vienna Convention was the subject of a major debate between the Disputing Parties before and during the oral hearing, which was later substantially re-invigorated with the NAFTA Free Trade Commission's Interpretation of 31st July 2001[6]. The particular issue was whether, with respect to the interpretations of Articles 1101 and 1105 NAFTA, the Tribunal should take account of a subsequent agreement and/or subsequent practice of the NAFTA Parties concerning the meaning of these provisions. It was the USA's case that the relevant agreement and practice were to be found in the concordant submissions of the USA, Canada and Mexico made in these arbitration proceedings. With the Free Trade Commission's Interpretation of Article 1105, the USA later contended that the relevant agreement was also to be found in that Interpretation (subject to the USA's separate submission based on Article 1131(2) NAFTA). These later submissions do not relate to Article 1101, which is not the subject of the Interpretation.

102. For reasons explained above, apart from jurisdiction and admissibility, the Tribunal does not decide in this Award the disputed interpretation of Article 1105 NAFTA. Accordingly, it is unnecessary to develop any further the USA's submissions based on Article 31(3) of the Vienna Convention (or Article 1131(2) NAFTA). (As also explained below, the Tribunal does decide the

[6] Article 31(3) provides: "*There shall also be taken into account, together with the context:(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;(c) any relevant rules of international law applicable in the relations between the parties*." For the text of the NAFTA Free Trade Commission's Interpretation of Article 1105(1), see Chapter C above.

disputed interpretation of Article 1101(1) NAFTA; but without requiring, for different reasons, any consideration of Article 31(3) of the Vienna Convention).

(3) Restrictive Interpretation

103. The USA contends that a doctrine of restrictive interpretation should be applied in investor-state disputes. In other words, wherever there is any ambiguity in clauses granting jurisdiction over disputes between states and private persons, such ambiguity is always to be resolved in favour of maintaining state sovereignty.

104. Methanex challenges the USA's invocation of this doctrine on the basis that it has no application to NAFTA. It relies in particular on the arbitration award in *Ethyl Corporation v. Canada (1998)*, and the arbitral decision in *The Loewen Group, Inc. v. United States (2001)*[7], as authority for the proposition that a liberal rather than a restrictive interpretation of NAFTA is appropriate. Methanex also contests the existence of a restrictive interpretation doctrine in investor-state disputes generally, and it here relies on (inter alia) *AMCO Asia Corp. v. Republic of Indonesia*, 1 ICSID Reports 377 (1983), as well as the separate opinion of Judge Shahabuddeen in *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement, Advisory Opinion*, 1988, ICJ Reports 12, 62 and the separate opinion of Judge Torres Bernandez in *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, 1992, ICJ Reports 351, 728.

[7] *Ethyl Corporation v. Canada (Award on Jurisdiction, 24th June 1998)*, paragraphs 55-56 and 59, 38 ILM 708 (1999) and *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB (AF) 98/3, 5th January 2001. (For these materials, see the web-sites at footnote 1, *supra*.)

105. The Tribunal rejects the contention of the USA for reasons which can be stated briefly, given that the point did not greatly influence our decision in this Award. In short, the legal materials invoked by Methanex clearly support its submissions in regard to the dispute resolution provisions contained in NAFTA's Chapter 11. Albeit in a slightly different context, as Judge Higgins decided in the *Oil Platforms Case* (paragraph 35 of her separate opinion): *"It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses."* We accept that the NAFTA Parties intended that the provisions of Chapter 11, particularly Article 1101(1) NAFTA, should be interpreted in good faith in accordance with their ordinary meaning (in accordance with Article 31(1) of the Vienna Convention), without any one-sided doctrinal advantage built in to their text to disadvantage procedurally an investor seeking arbitral relief.

(4) The Tribunal's Power

106. The Tribunal's power to rule on the USA's challenges necessarily derives from Chapter 11 NAFTA. In this respect, the scheme of Chapter 11 may be described as follows:

(i) *Article 1101(1)*: This is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met;

(ii) *Articles 1116-1117*: If Chapter 11 applies, an investor of a NAFTA Party has the right to submit a claim to arbitration in accordance with Articles 1116-1117;

(iii) *Article 1122*: Consent to the submission of the claim to arbitration is found in Article 1122;

(iv) *Article 1120*: The procedural framework for the claim is established by Article 1120. In the present case, the claim is submitted under the UNCITRAL Arbitration Rules as provided by Article 1120(1)(c). Pursuant to Article 1120(2), the UNCITRAL Arbitration Rules are *"the applicable arbitration rules"* and *"govern the arbitration except to the extent modified by"* Section B of Chapter 11; and

(v) *Article 21(1)*: Article 21(1) of the UNCITRAL Arbitration Rules constitutes the Tribunal's starting-point for jurisdictional challenges. It provides:

> *"The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement*."

Article 21(1) of the UNCITRAL Arbitration Rules is not modified or supplemented by the provisions of Section B of Chapter 11 NAFTA.

107. It follows from the text of Article 21(1) of the UNCITRAL Rules that the Tribunal has the express power to rule on objections that it has "no jurisdiction". This text, however, confers no separate power to rule on objections to "admissibility"[8].

[8] The French and Spanish texts of Article 21(1) are consistent with this interpretation: "*Le tribunal peut statuer sur les exceptions prises de son incompétence ...*" and "*El tribunal arbitral estará facultado para decidir acerca de las objeciones de que carece de competencia ...*". The English text of Article 41(2) of the ICSID Convention is materially similar (repeated in Rule 41(1) of the ICSID Arbitration Rules): see Schreuer *The ICSID Convention, A Commentary* (2001), p.520ff.

(5) The Dual Nature of the USA's Challenges

108. The USA has raised two distinct classes of challenge: first, as to the Tribunal's "jurisdiction"; and second, as to the "admissibility" of Methanex's claims. In its Memorial of 13th November 2000, the USA did not separately categorise its challenges in this way. However, it became clear in subsequent submissions that the USA's challenges to jurisdiction primarily concerned Article 1101(1) and other provisions of Section B of Chapter 11 (Articles 1116-1117 and 1121), whilst the USA's challenges to admissibility concerned substantive provisions under Section A of Chapter 11, namely Articles 1102, 1105 and 1110, which are the individual provisions in respect of which Methanex alleges breach by the USA.

109. The USA's challenges to admissibility are based upon the legal submission that, even assuming all the facts alleged by Methanex to be true, there could still never be a breach of the individual provisions pleaded by Methanex; and hence Methanex' claims are bound to fail, regardless of any factual evidence to be adduced by Methanex. Thus with regard to the challenge to Methanex's claim under Article 1102, the USA submitted:

> *"... our 1102 objection is an admissibility objection. In other words, that taking all of the allegations of fact made to be true, including uncontested facts, that as a matter of law, there can be no claim, and that the claim is ripe for dismissal at this stage for that reason"*[9].

[9] Mr Clodfelter for the USA, Transcript Day 2, p. 218. Similarly, Mr Legum, Transcript Day 2, p. 267, regarding Article 1105 NAFTA, and Mr Birnbaum, Transcript Day 2, p. 315, regarding Articles 1102, 1105 and 1110 NAFTA.

In the Tribunal's view, this form of challenge is not a jurisdictional challenge; and indeed if the Tribunal had no jurisdiction, it could not be invited by the USA (as it was) to dismiss the individual claim for lack of legal merit. We return to this important distinction below.

(6) The Practical Problem

110. The Tribunal faces an obvious practical problem in addressing the USA's various challenges. The parties' respective cases raise a large number of disputed issues of fact and law. Apart from any jurisdictional challenge, such issues would be decided by the Tribunal after a full hearing on the merits and a complete investigation of the relevant factual evidence and the legal principles to be applied specifically to such evidence. This arbitration, however, has only reached the jurisdictional phase. The Disputing Parties have not adduced any factual evidence on disputed issues (nor have they been entitled to do so); and the Tribunal cannot pre-judge any eventual decision on the merits, still less pre-determine any issue of disputed fact.

111. There is therefore a preliminary question as to the standard to which Methanex is required, in the face of the USA's several challenges, to establish the two essential components of its claim: (i) its allegations of fact and (ii) its allegations as to the legal meaning of the provisions of NAFTA Chapter 11 on which its case depends.

112. ***(i) Fact:*** It was common ground between the Disputing Parties that, for the purpose of this jurisdictional phase, Methanex was not obliged to prove its allegations of fact and that it was sufficient that Methanex should credibly allege the factual elements of its claim (Counter-Memorial on Jurisdiction, page 2; Reply of 12th April 2001, page 5). According to Methanex, this means that its allegations suffice unless the Tribunal determined that these allegations were incredible, frivolous or vexatious. If there was a material difference in these submissions from the submissions

made by the USA, albeit in different terms, it was not perceptible to the Tribunal; and in any event, the Tribunal accepts Methanex's submissions. It follows that the correct approach is to assume that Methanex's factual contentions are correct (insofar as they are not incredible, frivolous or vexatious) and to apply, under whatever appropriate test, the relevant legal principles to those assumed facts.

113. ***(ii) Law:*** This test proved highly contentious between the Disputing Parties; and it raised two successive questions. First, in applying the relevant legal principles to the assumed facts, does the Tribunal have definitively to decide the legal meaning of the relevant provisions of Chapter 11? Or is it sufficient for the Tribunal to establish that Methanex's interpretation is "arguable" or (since such interpretations were indeed argued by Methanex) "well arguable" or argued to some higher standard ? There is then a second question: is the same test to be applied to the provisions of Chapter 11 creating jurisdiction, i.e. Articles 1101, 1116, 1117 NAFTA as to those creating substantive obligations, i.e. Articles 1102, 1105 and 1110 NAFTA?

114. There are significant differences between the Disputing Parties on these two questions. For Methanex, relying on the separate opinion of Judge Shahabuddeen in *Case Concerning Oil Platforms*[10], it is sufficient that its interpretations of the relevant provisions of Chapter 11 should be "arguable". It may also be that Methanex adopted the conclusion of Judge Shahabuddeen in the *Oil Platforms* case to the effect that the International Court of Justice there had to decide definitively (and not provisionally) that the particular dispute was within the category of disputes for which the respondent had accepted the jurisdiction of the Court[11]. In other words, whilst an "arguable" interpretation would suffice in relation to provisions creating substantive obligations, it

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[10] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996, ICJ Reports 803 and *Ambatielos, Preliminary Objections*, 1952, ICJ Reports 28. (The *Oil Platforms* case is to be found on the web at http://www.icj-cij.org/icjwww/ido.../iop_ijudgment_19961212_Preliminary%20Objection.ht.)

[11] 1996, ICJ Reports 831.

might not suffice in respect of procedural provisions creating jurisdiction: the interpretation would there have to be conclusively correct.

115. According to the USA, the correct approach was to ascertain whether on the basis of the assumed facts there could be a violation of the relevant provisions; and this exercise required the Tribunal to make a definitive interpretation of all relevant NAFTA provisions. The USA rejected the reasoning of Judge Shahabuddeen; and the USA maintained that even on the basis of such reasoning, it would remain necessary for the Tribunal definitively to determine the meaning of the relevant jurisdictional clauses: e.g. Article 1101(1) NAFTA.

(7) The ICJ's Oil Platforms Case

116. The *Oil Platforms* case is a recent and important decision as to how contested issues of fact and legal interpretation can be treated in jurisdictional challenges. It is not of course the only example of the problem and it does not provide the only possible solution to every case. In our view, however, it does help point the way towards the answers required in the present case.

117. The International Court of Justice, in order to decide its jurisdiction to hear the case, interpreted each treaty provision as to which breach was alleged by the claimant (Iran), so as to establish whether the facts alleged by Iran were capable of leading to a breach of the provision:

> "*... the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application' of the Treaty of 1955. In order to answer that question, the*

Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain, pursuant to Article XXI, paragraph 2." (ICJ Reports 1996 (II), p. 810, paragraph 16).

118. In her separate opinion, Judge Higgins explains the reasoning behind the ICJ's approach:

"*The 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 accept pro tem the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them*." (Paragraph 32)[12]

(This approach is to be contrasted with the ICJ's approach towards provisional measures, where a claimant need only establish *prima facie* jurisdiction, for which purposes it is sufficient to show that the breaches of a given treaty *"are capable of falling within the provisions of that instrument"*: *Legality of Use of Force (Yugoslavia v. Belgium),* paragraph 38 expressly contrasting the jurisdictional approach in the *Oil Platforms* case).

[12] Judge Higgins' use of the word 'could' as opposed to 'would' is explained in the next paragraph of her opinion (referring to *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*): "*It is interesting to note that in the Mavrommatis case the Permanent Court said it was necessary, to establish its jurisdiction, to see if the Greek claims "would" involve a breach of the provisions of the article. This would seem to go too far. Only at the merits, after deployment of evidence, and possible defences, may "could" be converted to "would". The Court should thus see if, on the facts as alleged by Iran, the US actions complained of might violate the Treaty articles*."

119. The decision in the *Oil Platforms* case was reached in the context of an inter-state dispute subject to settlement pursuant to the Statute and Rules of Procedure of the International Court of Justice. The question whether the parties had there consented to the Court's jurisdiction could not be answered by accepting that the claimant's interpretation of the treaty's provisions was merely "arguable". It could only be answered in the affirmative if the claimant could show (i) that the legality of the parties' actions fell within the treaty (containing a clause conferring compulsory jurisdiction on the Court) and (ii) that the requirements of that clause were definitively met. As quoted above, the Court expressly rejected Iran's argument that there was inevitably a dispute within the jurisdiction clause once Iran contended that the treaty applied or that its provisions had certain meanings and the USA contended the opposite. Under the treaty, the answer to issue (i) required the interpretation of the substantive provisions of the treaty invoked by the claimant to determine if the alleged facts could amount to a breach of the treaty before the treaty (with its jurisdiction clause) could apply at all.

120. This Tribunal is faced with the same issue of whether the necessary consensual base for its jurisdiction is present. However, as appears from the scheme of NAFTA Chapter 11 outlined above, the jurisdictional requirements of Chapter 11 are (of course) different from the requirements of the 1955 Treaty. In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.

121. Accordingly, there is no necessity at the jurisdictional stage for a definitive interpretation of the substantive provisions relied on by a claimant: the jurisdiction of the arbitration tribunal is established without the need for such interpretation. Indeed a final award on the merits where a

NAFTA tribunal determines that the claimant has failed to prove its case within these substantive provisions cannot signify that the tribunal lacked jurisdiction to make that award. On the other hand, in order to establish its jurisdiction, a tribunal must be satisfied that Chapter 11 does indeed apply and that a claim has been brought within its procedural provisions. This means that it must interpret, definitively, Article 1101(1) and decide whether, on the facts alleged by the claimant, Chapter 11 applies. Similarly, insofar as the point is in issue, the tribunal must establish that the requirements of Articles 1116-1121 have been met by a claimant, which will similarly require a definitive interpretation of those provisions (as we have decided, in Chapter H above, in regard to Article 1116).

(8) The Admissibility Challenges

122. We now address the question whether the USA can seek at this jurisdictional stage a definitive interpretation of the substantive provisions of Chapter 11, Section A (namely Articles 1102, 1105 and 1110) to show that even on Methanex's alleged facts, there could never be a breach of the provisions; and that Methanex's claim is therefore "inadmissible". As noted above, in the case of a bilateral treaty providing for compulsory dispute resolution where there is a dispute as to the interpretation or application of the treaty, such a challenge could be jurisdictional in nature. But, in our view, that is not the case here.

123. Article 21(1) of the UNCITRAL Arbitration Rules does not accord to the Tribunal any power to rule on objections relating to admissibility. There is no express power; and it is not possible to infer any implied power. The most analogous procedure under the UNCITRAL Arbitration Rules would be a partial award on a preliminary issue tried on assumed facts, pursuant to Article 32 of the

UNCITRAL Arbitration Rules[13], or possibly a motion to strike (or "strike out") a pleading for failure to state a cause of action, taken from national court procedures. The first procedure, however, does not relate to jurisdiction; it necessarily assumes the exact opposite; and its existence confirms that it would be inappropriate to imply a like procedure into Article 21. The same is true of the second procedure, even if it were permissible to import that court procedure into a transnational arbitration. The contrary position would produce a curious result in an arbitral procedure where the tribunal's awards on the merits are intended to be "final and binding" (Article 32 of the UNCITRAL Arbitration Rules[14]). As contended by the USA, a decision on "inadmissibility" under Article 21 would be more easily reviewable, *de novo*, before the state courts of NAFTA Parties; and in that event the procedure before the tribunal would be duplicated at least twice over, for no obviously good purpose.

124. Nor is such a power to be found elsewhere in Chapter 11 NAFTA. Where the procedures set out in Chapter 11 are met, the NAFTA Party consents to arbitration; and such consent takes effect under Article II of the UN's 1958 New York Arbitration Convention (Article 1122). There is here no express power to dismiss a claim on the grounds of "inadmissibility", as invoked by the USA; and where the UNCITRAL Arbitration Rules are silent, it would be still more inappropriate to imply any such power from Chapter 11.

125. This position may be contrasted with the position of a dispute before the International Court of Justice. Article 79(1) of the ICJ Rules of Procedure concerning preliminary objections expressly provides:

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[13] Article 32(1) of the UNCITRAL Rules: "*In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards.*"

[14] Article 32(2): "*The award ... shall be final and binding on the parties. The parties undertake to carry out the award without delay.*"

> "*Any objection by the respondent to the jurisdiction of the Court* <u>*or to the admissibility of the application*</u>*, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial. ...*" (emphasis added.)

This terminology has given rise to fine distinctions between jurisdiction and admissibility[15]; and a notorious example is the *Barcelona Traction Case*[16]. It can also give rise to equally fine distinctions between a preliminary objection to the admissibility of the claim and a defence on the merits. According to Rosenne (*ibid*): "*As a rough rule-of-thumb, it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend, or when to decide the objection would require decision on what, in the concrete case, are substantive aspects of the merits, the plea is not an objection but a defence to the merits.*" It may therefore be doubted whether the USA's challenges would qualify before the ICJ as objections to admissibility falling within Article 79(1) of its Rules of Procedure. As we have already indicated, however, there is no equivalent rule on admissibility in the UNCITRAL Arbitration Rules.

126. ***Conclusion:*** It is unnecessary to develop these materials further. This Tribunal has no express or implied power to reject claims based on inadmissibility. Accordingly, we reject the USA's admissibility challenges generally.

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[15] Rosenne in *Law and Practice of the International Court, 1920-1996, Volume II, Jurisdiction*, pp. 883, 915.

[16] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections*, 1964, ICJ Reports, 4.

We also reject as jurisdictional challenges the USA's submissions on Articles 1102, 1105 and 1110 NAFTA; but as appears above, we do not otherwise decide the underlying legal merits of the USA's submissions on the interpretation and application of these provisions.

Only the challenge based on Article 1101 NAFTA now remains as a jurisdictional challenge, to which we turn below.

CHAPTER J -
THE USA'S JURISDICTIONAL CHALLENGE III:
ARTICLE 1101(1) NAFTA

(1) Introduction

127. The Scope and Coverage of Chapter 11 NAFTA is limited expressly by Article 1101(1) NAFTA. It provides that Chapter 11

> "*.. applies to measures adopted or maintained by a Party relating to*[17]*: (a) investors of another Party [or] (b) investments of investors of another Party in the territory of a Party*".

There is no dispute as to the existence of "measures" falling within Article 1101(1): i.e. the California Executive Order and the California Regulations (US Memorial on Jurisdiction, pages 48-49; Methanex Rejoinder of 25th May 2001, page 70). Similarly, there is no dispute that Methanex falls within the rubric of "investors of another Party".

128. The issue that divides the Disputing Parties is whether these US measures, on the assumed facts, "*relate to*" Methanex because, as recited above, neither measure was expressly directed at methanol, methanol producers or Methanex. Applying the approach described in the previous

[17] The French and Spanish texts, equally authentic, of NAFTA render this phrase respectively as: "*concernant*" and "*relativas a*" (see www.nafta-sec-alena.org and www.sice.oas.org/trade/nafta). Neither is synonymous with "affect".

chapter, it is necessary first to interpret definitively this phrase; and second to determine on the basis of the assumed facts, whether or not any of these measures relate to Methanex and its investments.

(2) The Meaning of the Phrase: "relating to"

129. It is a short phrase; and it might be thought, as with many issues of linguistic interpretation, that the answer was a matter of first impression. In order not to lengthen an already long document, we shall again refrain from dealing here with every submission on the issue made by the Disputing Parties and the NAFTA Parties, Canada and Mexico. We have nonetheless considered all those submissions; and in deciding here that the matter can properly be decided on a more limited basis, we intend no discourtesy to any person.

130. ***The USA:*** In summary, the USA contends that, in the context of Article 1101(1), the phrase "relating to" requires a legally significant connection between the disputed measure and the investor. It argues that measures of general application, especially measures aimed at the protection of human health and the environment (such as those at issue here), are, by their nature, likely to affect a vast range of actors and economic interests. Given their potential effect on enormous numbers of investors and investments, there must be a legally significant connection between the measure and the claimant investor or its investment. It would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments. Otherwise, untold numbers of local, state and federal measures that merely have an incidental impact on an investor or investment might be treated, quite wrongly, as "relating to" that investor or investment (USA Memorial on Jurisdiction, pages 48-49.)

(In response to submissions made by Methanex, the USA also relies on the common consensus of the NAFTA Parties that the phrase "relating to" in Article 1101(1) is not to be interpreted as meaning "affecting", as argued by Methanex. For reasons given in regard to Article 31(3)(b) of the Vienna Convention, we do not think it here necessary to develop this argument further).

131. ***Methanex:*** In summary, Methanex contends that it is sufficient that the measures "affect" the investor or its investment. It argues that the requirement for a legally significant connection between the measure and the investment is not supported by an interpretation of Article 1101(1) or other legal materials. Methanex relies on various dictionary definitions of the phrase, the separate opinion of Dr Schwartz in the *SD Myers* case (paragraphs 49-59 thereof) and the separate opinion of Judge Shahabuddeen in the *Headquarters Agreement* case[18], which refers in turn to the dissenting opinion of Judge Schwebel in the *Yakimetz* case (where "relating to" is interpreted as meaning "has reference to" or "is connected with"[19]). Methanex also contends that past statements of the USA and Canada support its interpretation and contradict the USA's current submissions. It cites the USA's interpretation of the words "relating to" put forward before the WTO appellate body in *United States Standards for Reformulated and Conventional Gasoline*. There, the phrase "relating to" was interpreted as merely suggesting "any connection or association existing between two things"[20]. Methanex also refers to Canada's reformulation of "related to" as "affecting" in its Statement of Implementation of NATFA.

132. ***Intent:*** In any event, Methanex contends that the "relating to" requirement is easily satisfied where a discriminatory intent is alleged against the maker of the measure; and it alleges that the measures are primarily aimed at eliminating methanol and MTBE from the market and at favouring the US

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[18] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* of 26 June 1947, 1988 ICJ Rep. 12, Separate Opinion of Judge Shahabuddeen, at 63.

[19] *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, 1987 ICJ Rep. 18, Dissenting Opinion of Judge Schwebel, at 113-114.

[20] Submissions of the US (Appellant) 1996 WL 112677 (WTO), paras. 32-33.

domestic ethanol industry. Accordingly, if that amendment were allowed in the form of the Amended Statement of Claim, Methanex submits that the USA's challenge must to this extent fail. It submits that the measures targeted Methanex in three ways: (i) there was an intention to restrict imports from suppliers such as Methanex; (ii) there was an intention to benefit directly Methanex's competitor, the US ethanol industry; and (iii) the measure had such a significant impact on Methanex that the measure should be treated as relating to Methanex and its investments in circumstances where the harm was foreseeable and direct.

133. ***Canada***: In summary, Canada expressly disagrees with Methanex's interpretation of the phrase. Canada submits that this interpretation fails to conform to the rules of the Vienna Convention; and it agrees with the USA that the phrase requires a significant connection between the measure at issue and the essential nature of the investment (Article 1128 submission of 30th April 2001, at paragraphs 11 and 23). In its Second Submission[21], Canada places particular reliance on Article 31(3)(b) of the Vienna Convention and notes its agreement with the USA that interpretations of NAFTA in respect of which all three NAFTA Parties concur are authoritative. As indicated already, we do not think it here necessary to develop this submission in this Award.

134. ***Mexico***: In summary, Mexico also disagrees with Methanex's interpretation of the phrase; and it agrees with the position of the USA (Article 1128 submission of 15th May 2001 at paragraphs 6-7). Mexico contends that the drafters of NAFTA required a "*more direct nexus between the measure and the investor or its investment than mere effect*"; and that this clearly appears from other provisions of NAFTA where the term "affecting" is used instead of "relating to" in order to indicate a broader scope of obligation. Like Canada, Mexico states its agreement with the USA on the authoritative nature of an agreement by the three NAFTA Parties as to the meaning of a particular provision pursuant to Article 31(3) of the Vienna Convention; and in this case Mexico

[21] Canada's First Submission pursuant to Article 1128 NAFTA related to the issues on amicus curiae (10th November 2000).

submits that the consensus of the USA, Canada and Mexico constitutes a subsequent agreement on interpretation and reflects their common practice, from which a NAFTA tribunal should not diverge. Again, beyond recording this submission, we think it unnecessary here to develop it further.

(3) The Ordinary Meaning

135. These rival interpretations can each be advanced in good faith; and under Article 31(1) of the Vienna Convention, the first issue turns on the ordinary meaning of the phrase "relating to". Methanex relies on definitions of "relate" and "related" contained in three English language dictionaries: *American Heritage Dictionary* ("related" defined as "connected, associated"), the *Oxford English Dictionary* ("related" defined as "having relation to, or relationship with, something else"), and *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* ("related" defined as "standing in relation; connected"). In each case, the word "relate" has an associated definition.

136. In the Tribunal's view, none of these dictionary definitions decide the issue. To a limited extent, they support the USA's reliance on the requirement of a "connection". These definitions imply a connection beyond a mere impact, which is all that the term "affecting" involves on Methanex's interpretation. Nevertheless, we do not consider that this issue can be decided on a purely semantic basis; and there is a difference between a literal meaning and the ordinary meaning of a legal phrase. It is also necessary to consider the ordinary meaning of the term in its context and in the light of the object and purpose of NAFTA and, in particular, Chapter 11 (as required by Article 31(1) of the Vienna Convention).

(4) Context, Object and Purpose

137. For Methanex, the phrase "relating to" should be interpreted in the context of a treaty chapter concerned with the protection of investors; and hence, a broad interpretation is appropriate. Because of its simple application, it is an attractive interpretation; but it is also a brave submission. If the threshold provided by Article 1101(1) were merely one of "affecting", as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to Methanex who suffered as a result of Methanex's alleged losses, suppliers to those suppliers and so on, towards infinity. As such, Article 1101(1) would provide no significant threshold to a NAFTA arbitration. A threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all; and the attractive simplicity of Methanex's interpretation derives from the fact that it imposes no practical limit. It may be true, to adapt Pascal's statement, that the history of the world would have been much affected if Cleopatra's nose had been different, but by itself that cannot mean that we are all related to the royal nose. The Chaos theory provides no guide to the interpretation of this important phrase; and a strong dose of practical common-sense is required.

138. In a legal instrument such as NAFTA, Methanex's interpretation would produce a surprising, if not an absurd, result. The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable. For example, in the law of tort, there must be a reasonable connection between the defendant, the complainant, the defendant's conduct and the harm suffered by the complainant; and limits are imposed by legal rules on duty, causation and remoteness of damage well-known in the laws of both the United States and Canada. Likewise, in the law of contract, the contract-breaker is not generally liable for all the consequences of its breach even towards the innocent party, still less to persons not privy to that contract. It is of course possible, by contract or statute, to enlarge towards infinity the legal

consequences of human conduct; but against this traditional legal background, it would require clear and explicit language to achieve this result.

139. The approach here can be no different. Methanex's interpretation imposes no practical limitation; and an interpretation imposing a limit is required to give effect to the object and purpose of Chapter 11. The alternative interpretation advanced by the USA does impose a reasonable limitation: there must a legally significant connection between the measure and the investor or the investment. With such an interpretation, it is perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide between night and day. Nonetheless, whilst the exact line may remain undrawn, it should still be possible to determine on which side of the divide a particular claim must lie.

140. ***UN New York Convention:*** This interpretation is supported by the reference to the UN 1958 New York Convention in Article 1222 NAFTA , whereby the consent of the NAFTA Party to arbitration under Article 1122(1) is to be treated as satisfying the requirement of Article II of the New York Convention. Article II(1) of the New York Convention limits the recognition of written agreements to arbitrate differences that may arise "*in respect of a defined legal relationship*":

> "*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship* [22]*, whether contractual or not, concerning a subject matter capable of settlement by arbitration*."

[22] The equivalent phrase in the French and Spanish texts are: "*au sujet d'un rapport de droit déterminé*" and "*respecto a una determinada relacíon jurídica*".

It is therefore not sufficient for the purpose of Article II(1) that there be a limitless agreement to arbitrate any future disputes that may ever arise between the parties. More is required for a valid arbitration agreement: the dispute must arise in respect of "*a defined legal relationship*"[23].

[23] See van den Berg, *The New York Arbitration Convention of 1958* (1st ed), p.149.

(5) Other NAFTA Awards

141. As to authority, Methanex relies on two arbitration awards decided under NAFTA Chapter 11: *Pope & Talbot v. Canada* (award of 26th January 2000) and *S. D. Myers v. Canada* (award of 13th November 2000, separate opinion of Dr Schwartz dated 12th November 2000)[24]. These are not sources of law; and neither can be regarded as authority legally binding upon this Tribunal. Nonetheless Methanex is entitled to adopt their legal reasoning as part of its case.

142. ***Pope & Talbot:*** In *Pope & Talbot*, Canada contended that a measure could only relate to an investment if it was "primarily directed" at that investment and, in particular, that an allocation quota was not related to an investor whose trade was nevertheless directly affected by that quota. As is clear from paragraphs 33-34 of the award, the tribunal did not reject Canada's argument that it was insufficient that a measure "affect" an investor. The tribunal did reject the contention that the measure must be primarily directed at the investment; but this is not what the USA now contends; and the case is therefore only of limited assistance to Methanex's submissions.

143. ***S.D. Myers:*** As to the separate opinion of Dr Schwartz, one of three arbitrators in the *S. D. Myers* arbitration, the author was apparently departing from the tribunal's collegiate consideration of the specific case. He agreed that the investment had there been the specific target of a measure, such that the "relating to" requirement was met by the investor; and in his separate opinion this distinguished arbitrator was volunteering only his general comments (especially at paragraphs 48-49). Without being shared by his two arbitral colleagues or forming part of their award's reasoning, this opinion carries no special status; and whilst the low threshold envisaged by Dr Schwartz appears to support Methanex's submissions, the Tribunal finds no persuasive support in his reasoning sufficient to displace the interpretation decided above.

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[24] For these materials, see the web-sites at footnote 1, *supra*.

(6) Prior Statements of the USA and Canada

144. As to past contentions of the USA, Methanex relies on an interpretation of "relating to" advanced before the WTO Appellate Body in *United States Standards for Reformulated and Conventional Gasoline*, to the effect that "relating to" signifies "any connection or association existing between two things"[25]. In the Tribunal's view, this is again of only marginal assistance to Methanex.

145. The USA's interpretation was there made in a "normal context"; whereas in the context of the specific provision (Article XX(g) of the General Agreement), its position was as follows:

> *The phrase "relating to conservation", interpreted in its context and in light of the purpose of the General Agreement, means that the measure being examined has a connection to conservation that is not incidental or tangential, but that does not have to be "necessary" or "essential" ...*" (paragraph 31).

The "normal context" interpretation does not appear materially different from the dictionary definitions; and the interpretation actually relied on by the USA is evidently specific to the particular context. This demonstrates the importance attributed by the USA to interpreting a term in its particular context and in the light of an instrument's object and purpose, an approach consistent with the USA's submissions in the present case. In the event, the WTO Appellate Body decided that Article XX(g) of the General Agreement required that a measure had to be "primarily related to conservation"[26]. That its interpretation in this respect was quite different from the interpretation in

[25] Submissions of the US (Appellant) 1996 WL 112677 (WTO), paras. 32-33.

[26] 1996 WL 227476, 11 WTO, at paragraph 12.

the *Pope & Talbot* case again confirms the need to interpret a term in accordance with the particular context, object and purpose.

146. ***Canada:*** Methanex also relies on Canada's Statement of Implementation of NATFA, where it summarised Article 1101 as follows:

> "*Article 1101 states that section A covers measures by a Party (i.e., any level of government in Canada), that affect*[27]*: investors of another Party ...; investments of investors of another Party . . .; and . . . for purposes of the provisions on performance requirements and environmental measures, all investments ...*".

This English text supports Methanex's interpretation, although the French text is, at best, neutral. Overall, the status of this succinct, unreasoned commentary by another NAFTA Party carries the argument little further; and it provides no sufficient reason to change the interpretation decided above.

147. ***Conclusion:*** We decide that the phrase "relating to " in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them, as the USA contends. Pursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention, we base that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA's Chapter 11. As indicated above, it is not necessary for us to

[27] In the French text of this document, the word "affect" appears as "agissant" suggesting something active which produces a direct impact on something else - in its full context: "*Aux termes de l'article 1101, la section A vise toute mesure prise par une Partie (c'est-à-dire, pour le Canada, tout palier gouvernemental) et agissant sur: les investisseurs d'une autre Partie ... les investissements effectués par les investisseurs d'une autre Partie ... et pour les fins des dispositions concernant les prescriptions de résultats et les mesures environmentales, tous les investissements ...*"

address other submissions advanced by the USA in support of its interpretation based on Article 31(3) of the Vienna Convention (supported by Canada and Mexico).

CHAPTER K -
ARTICLE 1101(1) NAFTA:
APPLICATION TO THE ASSUMED FACTS

(1) Introduction

148. Pursuant to Article 18 of the UNCITRAL Arbitration Rules, Methanex was required to submit a statement of claim including a precise statement of (*inter alia*) the facts supporting its claim. For present purposes, the Tribunal has decided to take into account the further facts alleged in Methanex's Amended Statement of Claim, as also developed in its written and oral submissions. We have attempted to summarise the relevant factual allegations in Chapter E above; and it is against these assumed facts that we now apply our interpretation of Article 1101(1) NAFTA.

149. Two explanations are necessary. First, subject to an important reservation to which we return below, we accept that the factual allegations pleaded by Methanex's legal representatives are not incredible, frivolous or vexatious. Second, we accept that it is open to Methanex to rely on reasonable inferences; and it may rely generally on circumstantial materials.

(2) Methanex's Original Statement of Claim

150. It must follow from our interpretation of Article 1101(1) that Methanex's claim, as originally pleaded in its Original Statement of Claim, does not meet the essential requirements of alleging facts

establishing a legally significant connection between the US measures, Methanex and its investments. As there pleaded, the measures do not relate to methanol or Methanex; and accordingly, this Tribunal decides that it would have no jurisdiction to hear that claim, as pleaded in the Original Statement of Claim.

(3) Methanex's Amended Statement of Claim

151. As to Methanex's Amended Statement of Claim, the answer is potentially different. As regards its allegations surrounding the meeting with ADM on 4th August 1998, Methanex contends, as characterised in its Reply Submission of 27th July 2001 (page 9), "*that Gov. Davis intended to benefit the US ethanol industry and to penalise foreign producers of methanol and MTBE*". Methanex contends that the "relating to" requirement under Article 1101(1) NAFTA is satisfied where harmful intent is alleged by the claimant against the source of the disputed measure.

152. On this point, subject to an important qualification, there was apparently a measure of common ground between the Disputing Parties. At the jurisdictional hearing of July 2001, the USA accepted with regard to Article 1101 that: "*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*" (Transcript, Day 3, p. 531). That qualification relates to the credibility of Methanex's allegations concerning the intent underlying the US measures, to which we turn below. (At a later stage of these proceedings, it may become necessary to consider more precisely the scope of this apparent common ground between the Disputing Parties).

(4) The Assumed Facts and Intent

153. The relevant assumed facts, summarised in Chapter E above, can be recalled briefly: ADM drives the US ethanol industry's political and lobbying machine, ADM has launched a systematic attack on MTBE; ADM has characterised MTBE as a "foreign" product; ADM had a secret meeting with Governor Davis during his election campaign; this meeting concerned ethanol; ADM made substantial campaign contributions to Governor Davis; and after being elected, Governor Davis made the California Executive Order (leading to the California Regulations) banning MTBE, notwithstanding that MTBE is a safe product and other rational solutions exist for addressing California's drinking water problems. From these alleged facts, Methanex also invites the Tribunal to make a series of inferences:

(i) That, at the secret meeting, ADM stated that MTBE was a "foreign" product and that banning MTBE would be a patriotic step to reduce US dependence on fuels;

(ii) That in bringing about the US measures Governor Davis acted on what he was told by ADM;

(iii) That in bringing about the measures Governor Davis acted to favour ADM and the US ethanol industry; and

(iv) That Governor Davis also acted to disadvantage, relative to ADM and the US ethanol industry, the "foreign" producers of MTBE.

154. On the sole basis of these assumed facts and inferences, it is doubtful that the essential requirement of Article 1101(1) is met. It could be said with force that the intent behind the measures would be, at its highest, to harm foreign MTBE producers with no specific intent to harm suppliers of goods and services to such MTBE producers. If so, the measures would *not* relate to methanol suppliers such as Methanex; and accordingly, even with such intent as alleged by Methanex, we would have

no jurisdiction to decide Methanex's amended claim. However, Methanex's case does not stop here. It is further alleged that Governor Davis had a broader objective: to favour ADM and the US ethanol industry, to penalise "foreign" MTBE producers *and* "foreign" methanol producers, such as Methanex.

155. The USA responds that this cannot be a credible allegation, for several reasons. First, on the assumed facts, there is no reason why ADM should be concerned with disadvantaging methanol suppliers because ADM's commercial objective is already achieved by the ban on MTBE. Second, on the assumed facts, Governor Davis fulfils his own objectives by penalising MTBE producers; and there is no reason why he should also be concerned with the suppliers to these producers or their products, such as methanol and Methanex. Third, the USA contends that there are strong grounds for inferring that Governor Davis could not have intended to penalise "foreign" methanol producers because there is a substantial US methanol industry equally subject to such intentional harm.

156. In addition, the USA contends that there is no sufficient reason for attributing ADM's motives to Governor Davis; it cannot be inferred that the meeting had any significant influence on Governor Davis when it is not alleged that ADM representatives said anything beyond ADM's usual public statements; it is significant that no bribery or corruption is alleged by Methanex; the California Bill significantly pre-dates the meeting; and as provided by the California Bill, a study was carried out by the University of California on the human health and environmental risks and benefits associated with the use of MTBE; this study was subjected to public scrutiny in February-March 1999 and only thereafter was the California Executive Order made; and on the face of this Order, Governor Davis acted on the basis that there was a significant risk to the environment and public health from using MTBE in gasoline in California, as reported by the University of California, public testimony and regulatory agencies.

157. These are powerful points; and if it were possible for us safely to conclude at this stage that there was nothing more to Methanex's case, we would be minded to decide that the requirements of Article 1101(1) were still not met with a sufficiently credible allegation of intent. However, Methanex also alleges that it supplies the majority of methanol in California; that California had no methanol industry of its own; and that as regards MTBE in California, it is essentially Methanex's methanol which provides the relevant "foreign" characteristic which allowed ADM to promote ethanol to Governor Davis to the disadvantage of MTBE. Whatever the position elsewhere in the USA, methanol and Methanex were "foreign" in California; and this, it is suggested, explains why anti-foreigner action could be taken against methanol in California which on its face would appear to hurt US producers of methanol. In short, it is contended, as regards Governor Davis, that his constituency was the State of California; a "foreign" product was a product foreign to California, which to him, as influenced by ADM, signified methanol produced by Methanex, a "foreign" product produced by "foreigners"; and his intent was to harm Methanex.

158. In these circumstances, we do not consider the case clear enough to determine whether or not Methanex's allegations based on "intent" are sufficiently credible. Accordingly, it is not possible for us to decide, at this stage, that any measure does or does not relate to Methanex or its investments. In particular, decrees and regulations may be the product of compromises and the balancing of competing interests by a variety of political actors. As a result, it may be difficult to identify a single or predominant purpose underlying a particular measure. Where a single governmental actor is motivated by an improper purpose, it does not necessarily follow that the motive can be attributed to the entire government. Much if not all will depend on the evidential materials adduced in the particular case.

159. Accordingly, given the procedural solution on which we have decided below, it would be inappropriate here to develop any further analysis of Methanex's factual case. As we have said

already, we do not wish to pre-judge the evidence on disputed issues or indeed further submissions on that evidence; and so far we have heard neither.

(5) Article 21(4) of the UNCITRAL Arbitration Rules

160. Article 21(4) of the UNCITRAL Arbitration Rules requires the arbitration tribunal, in general, to rule on a jurisdictional plea as a preliminary question; and indeed this is the procedure which has so far been followed in these arbitration proceedings. If the Tribunal had no jurisdiction, a decision to that effect could save the Disputing Parties much time and cost. However, as Article 21(4) also provides, the tribunal "*may proceed with the arbitration and rule on such a plea in their final award*"[28]. The discretion whether to choose the general or the exceptional procedure lies with the arbitration tribunal; and the exercise of that discretion is not confined to economic factors: e.g. where jurisdictional issues are intertwined with the merits, it may be impossible or impractical to decide the former without also hearing argument and evidence on the latter. In these proceedings, two factors have influenced us in selecting the exceptional procedure.

161. ***Fresh Pleading:*** First, the effect of the Tribunal's decision on Article 1101(1) NAFTA in this Award will require Methanex to re-plead its case in a fresh Statement of Claim. Its Original Statement of Claim fails the jurisdictional test under Article 1101; and potentially only a part of its Amended Statement of Claim can survive that test. It is inappropriate for Methanex to re-amend its Amended Statement of Claim. In our view, a fresh pleading is required both for the Tribunal and as a matter of procedural fairness to the USA, which is entitled to know precisely the case advanced against it.

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[28] Article 21(4): *"In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."*

162. Methanex's fresh pleading must take a form different from and more limited than its Amended Statement of Claim. Several material allegations made by Methanex as it developed its oral and written submissions do not appear in the Amended Statement of Claim (nor, of course in the Original Statement of Claim); and it will be for Methanex's careful consideration whether, to what extent and in what form these allegations will be formally pleaded. The fresh pleading must not exceed the limits of Methanex's existing case (pleaded and unpleaded); and we do not intend Methanex to make any new claim in its fresh pleading. It must comply with our decisions in this Award and Articles 18 and 20 of the UNCITRAL Arbitration Rules. As regards the statement of the facts supporting its claim under Article 18(2)(b), Methanex's fresh pleading must set out its specific factual allegations, including all specific inferences to be drawn from those facts.

163. At this stage of the proceedings, we also decide that more is required of Methanex than a fresh pleading. As regards the USA's alleged liability, Methanex must file with that pleading copies of all evidential documents on which it relies (unless identified as documents previously filed with the Tribunal), together with factual witness statements and expert witness reports of any person intended by Methanex to provide testimony at an oral hearing on the merits. For the time being, we exclude evidential materials relating to the alleged quantum of the USA's liability.

164. In regard to a factual witness, the factual witness statement must be in writing, signed and dated by that witness, setting out: (i) the full name and address of the witness, that witness's present and past relationship with Methanex (if any); and a description of the witness's background, qualifications, training and relevant experience; (ii) a full and detailed account, capable of standing as that witness' examination-in-chief (direct examination) at an oral hearing, of all the facts to which that witness will testify, expressed in that witness's own words, and identifying the specific source of the witness's information, whether it be from that witness's own knowledge or derived from another

person or document; and (iii) that witness's undertaking to attend and give evidence at an oral hearing, unless ordered otherwise by the Tribunal.

165. In regard to an expert witness, the expert report shall be in writing, signed and dated by that witness setting out: (i) the same matters specified in paragraph 164(i) above; (ii) a statement of the facts on which the expert witness has based his or her expert opinions and conclusions, including (if relevant) a description of the method, materials and other information used in arriving at those opinions and conclusions; (iii) a statement of those expert opinions and conclusions; (iv) an acknowledgment by the expert witness of his or her independent duty to assist the Tribunal, including attendance at an oral hearing unless otherwise ordered by the Tribunal; and that this duty overrides any obligation to Methanex as the person engaging or paying that expert witness; and (v) a statement by the expert witness of the truth of those opinions and conclusions.

166. At this stage, it is not possible for the Tribunal to envisage the terms of Methanex's fresh pleading and the content of these evidential materials. It is also self-evident that we cannot now decide, conclusively, that a future re-pleading of Methanex's case will or will not meet the requirements of Article 1101(1) NAFTA. It would be possible, perhaps, to resume the jurisdictional stage of these proceedings once Methanex has submitted its fresh pleading; but this would add to the time and cost already taken on jurisdictional issues; and it is not for that reason an attractive option for the Tribunal.

167. ***Evidence:*** The second reason is, in our view, conclusive. The necessary analysis relating to the credibility of Methanex's allegations remains incomplete without receiving at least some evidence from the Disputing Parties on the assumed, but disputed, facts and factual inferences. This part of the USA's jurisdictional challenge depends critically on issues which are intimately linked to the factual merits of Methanex's case. In our view, it is not appropriate to decide these issues without hearing evidence from Methanex and the USA. In short, the Tribunal cannot continue what has

become an impossible forensic exercise, composing a jigsaw of assumed facts and inferences with too many missing and incomplete pieces. These difficulties could be resolved with relative ease at an evidential hearing.

168. We are not, however, yet ready to decide upon the precise form of that evidential hearing. We need first to see the scope and nature of Methanex's evidential case; hence our decision above that Methanex must file more than a fresh pleading. After we have considered Methanex's fresh pleading and accompanying evidential materials, subject to consultation with the Disputing Parties, it is our present intention to decide then how to proceed further. It may be that we can identify one or more threshold or other determinative issues on which limited testimony would be adduced at an early oral hearing. It is not our present intention that the case should then proceed necessarily to a full hearing of all factual and expert witnesses. In either event, it will of course be necessary for the USA to plead a response to all or part of Methanex's fresh case (including the filing of its own documentary evidence, witness statements and expert reports); and it could be helpful to make further procedural orders. All that, however, lies in the future.

(6) Conclusion

169. As regards the USA's jurisdictional challenge under Article 1101(1) NAFTA, the Tribunal decides that certain allegations advanced in Methanex's Amended Statement of Claim, supplemented by its written and oral submissions, relating to the "intent" behind the US measures can potentially meet the requirements of that provision. At this stage of the proceedings, however, it is impossible for the Tribunal to make a definitive ruling on jurisdiction without a fresh pleading and accompanying evidential materials from Methanex; and accordingly that ruling will be postponed by the Tribunal

until one or more further awards pursuant to Articles 21(4) and 32(1) of the UNCITRAL Arbitration Rules.

CHAPTER L -
LEGAL AND ARBITRATION COSTS

170. Under Articles 38-40 of the UNCITRAL Arbitration Rules, the arbitration tribunal is required to fix the costs of arbitration in its award, including the costs of the arbitration and the reasonable costs of the successful party for legal representation and assistance, subject to possible apportionment to reflect the relative success and failure on different parts of the case.

171. We make no order for costs in this Award, nonetheless reserving our power to do so in a later award, after hearing further submissions from the Disputing Parties. Having regard to the successive re-pleadings of Methanex's case and the relative failure and success of the USA's challenges on jurisdiction and admissibility, we shall invite submissions on whether and to what extent a reasonable apportionment should be made, whatever the eventual result of this case on the merits.

CHAPTER M -
OPERATIVE PART

172. For the reasons set out above, the Tribunal makes the following rulings and decisions:

(1) ***Admissibility:*** **The Tribunal dismisses the USA's several challenges based on the "admissibility" of Methanex's claims;**

(2) ***Jurisdiction - Original Statement of Claim:*** **As regards the USA's jurisdictional challenge under Article 1101(1) NAFTA, the Tribunal decides that Methanex's Original Statement of Claim fails to meet the requirements of that provision; and, as there pleaded, the Tribunal would have no jurisdiction to hear Methanex's claims;**

(3) ***Jurisdiction - Amended Statement of Claim:*** **Subject to paragraph 4 below, as regards the USA's jurisdictional challenge under Article 1101(1) NAFTA, the Tribunal decides that Methanex's Amended Statement of Claim,** ***as a whole,*** **likewise fails to meet the requirements of that provision; and as there pleaded, the Tribunal would have no jurisdiction to hear Methanex's Amended Statement of Claim** ***as a whole*****;**

(4) As regards part of Methanex's Amended Statement of Claim (as subsequently supplemented by its written and oral submissions), the Tribunal decides that certain allegations relating to the "intent" underlying the US measures could potentially meet the

requirements of Article 1101(1) NAFTA, thereby allowing part of Methanex's case to fall within the jurisdiction of the Tribunal.

It is impossible for the Tribunal now to make a ruling on jurisdiction in regard to this part of Methanex's case without a fresh pleading from Methanex accompanied by evidential materials, to be followed (subject to consultation with the Disputing Parties) by a pleading and evidential materials from the USA and an evidential hearing which may be limited to one or more threshold or determinative issues arising from Methanex's fresh pleading.

Accordingly, that jurisdictional ruling will be postponed by the Tribunal until one or more further awards pursuant to Articles 21(4) and 32(1) of the UNCITRAL Arbitration Rules;

(5) ***New Pleading:*** **Within a period not more than ninety days from the date of this Award, Methanex shall submit a fresh pleading, complying with Articles 18 and 20 of the UNCITRAL Arbitration Rules and conforming to the decisions contained in this Award; and that pleading shall be accompanied by the evidential materials described in this Award;**

(6) ***Amendment:*** **Subject to Paragraphs 4 and 5 above, the Tribunal does not allow Methanex's application to amend its claim in the form of the Amended Statement of Claim;**

(7) ***Other Jurisdictional Challenges:*** **The Tribunal does not accept the USA's other jurisdictional challenges;**

(8) ***Documentary Disclosure:*** **The Tribunal makes no ruling for the time being on Methanex's Application for Documentary Disclosure, it being allowed to re-submit this application after serving its fresh pleading (if relevant); and**

(9) ***Costs:*** **The Tribunal makes no order for costs in this Award, reserving its power to do so in a later award.**

Made by the Tribunal on 2002, as at the International Centre for Settlement of Investment Disputes, the World Bank, Washington DC, USA.

William Rowley **Van Vechten Veeder** **Warren Christopher**

ANNEX TO PARTIAL AWARD

Relevant Provisions of

NAFTA Chapter 11 and the UNCITRAL Arbitration Rules

A - THE ARBITRATION AGREEMENT

(1) Article 1122 NAFTA

Article 1122: Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of: ... (b) Article II of the New York Convention for an agreement in writing ...

(2) UNCITRAL Arbitration Rules

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include a precise statement of the following particulars:

(a) The names and addresses of the parties;
(b) A statement of the facts supporting the claim;
(c) The points at issue;
(d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

....

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

B - APPLICABLE LAW

(1) Article 1131 NAFTA

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

(2) UNCITRAL Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. ...

...

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

C - NAFTA ARTICLES: CHAPTER 11, SECTION A - INVESTMENT

Article 1101

Article 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:

> *(a) investors of another Party;*
> *(b) investments of investors of another Party in the territory of the Party; and*
> *(c) with respect Articles 1106 and 1114, all investments in the territory of the Party.*

Article 1102

Article 1102: National Treatment

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

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

Article 1105

Article 1105: Minimum Standard of Treatment

1. 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. ...

Article 1110

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and Article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6.

D - NAFTA ARTICLES: CHAPTER 11, SECTION B - SETTLEMENT OF DISPUTES

Article 1116

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A ...

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 1117

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A...

and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

Article 1121

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if: ...

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise: ...

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration ...

Article 1128

Article 1128: Participation by a Party:

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.