IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER 11 OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

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METHANEX CORPORATION, :
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Claimant/Investor, :
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v. :
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UNITED STATES OF AMERICA, :
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Respondent/Party. :
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Monday, March 31, 2003

Conference Room MC13-121
The World Bank
1818 H Street, N.W.
Washington, D.C.

The hearing in the above-entitled matter was convened at 9:30 a.m. before:

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ALSO PRESENT:

MARGRETE STEVENS, Administrative Secretary
SAM WORDSWORTH
JOSE ANTONIO RIVAS

JAMES EMMERTON
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C O N T E N T S

P R O C E E D I N G S

PRESIDENT VEEDER: Good morning, ladies and gentlemen. There are some new faces around the table. I think you know very well, to my left, Professor Michael Reisman. Margrete Stevens, Sam Wordsworth are the same, Will and myself are here, and we also have Jose Antonio Rivas, who is helping us today from ICSID.

You seem to have swapped places from last time, as I recall, but if we can just run through the representations, starting with you, Mr. Dugan.

MR. DUGAN: Certainly. My name is Christopher Dugan. I'm with the law firm of Paul, Hastings, and I'm here on behalf of the claimant, Methanex Corporation. To my left are two colleagues of mine from Paul, Hastings: Quisaira Whitney and Alexander Koff. And behind me are representatives of Methanex itself: Mr. James Emmerton, who is the general counsel; Mr. MacDonald, who is a senior officer; Mr. Wayne Wright, who is in the Washington office. And two members of the law firm of Grey, Clark, Shih of Toronto and Ottawa: Mr. Peter Clark and Mr. Gordon LaFortune.

PRESIDENT VEEDER: Thank you very much.

If we can turn to the USA, is it you, Mr. Clodfelter, who will do the introductions?

MR. CLODFELTER: It is, Mr. President. Again, I'm Mark Clodfelter, Assistant Legal Adviser for International Claims and Investment Disputes in the Office of the Legal Adviser at the State Department. And to my right is Bart Legum, who is chief of the NAFTA Arbitration Division of that office, and a number of members from that team, including Andrea Menaker, David Pawlak, Jen Toole, and Mark McNeill.

There are also various observers and representatives from the Canadian and California governments present, and I'll let them introduce themselves--I'm sorry, the United States Government and the California government present.

PRESIDENT VEEDER: Would you like to introduce yourselves?

[Introductions inaudible, off microphone.]

PRESIDENT VEEDER: Thank you very much.

Are Canada and Mexico here?

[No response.]

PRESIDENT VEEDER: I take it they're not.

Well, the agenda we propose for today's meeting is really to start with the procedural matter raised originally in the partial award in paragraph 168, page 70, with which you're very familiar. We'd like to wrap

into that the questions that have arisen under the IBA rules and our powers to order production of documents both from non-parties and, it appears, non-parties [sic]; and also the questions that have arisen under Article 1782.

What we'd invite the parties to do is to add to the submissions which they have made in writing earlier this year, ending with the submissions from Methanex which we received on Friday. We'd invite Methanex to start and then for the USA to respond, and then we may pause to see where we've got to.

We don't anticipate at the moment that you would need more than about 45 minutes. We're not putting a time limit on you. If you need longer, please say so. It's just that what we would like to do is to get through the first part of the meeting this morning to give us a chance to deliberate during the lunch break, and then to come back at 2 o'clock or 2:30 with some sort of idea we'd like to discuss with you as to how we best see these proceedings should go forward.

There are other minor items we have to raise, but for the moment, let's leave those outside. I think I've deal with the most important things in the items I've just listed.

Now, is that satisfactory from Methanex's perspective?

MR. DUGAN: Yes, that's satisfactory. Would you prefer to go through it issue by issue rather than to go through it--

PRESIDENT VEEDER: It's entirely up to you. We see the future procedure as intertwined a little bit with 1782 and some with the documentary and evidential requests that you've made. But is entirely how you--you present it however you want, but certainly present all the material on the issues that you want to raise. Then we'll turn the floor over to the USA, and we'll give you a chance to reply as well to each other.

MR. DUGAN: Certainly.

PRESIDENT VEEDER: Subject to that, is that satisfactory as a procedure for the USA?

MR. CLODFELTER: Yes.

PRESIDENT VEEDER: Well, let's start with Methanex. Mr. Dugan?

MR. DUGAN: Thank you very much. I don't think that I will be taking that much time. I think that the submissions that we made in the second amended claim and the evidence that we submitted on January 30th and in our most recent submission cover the issues as adequately and

as thoroughly as we can. But if I could, I'd just like to go over a few highlights and try to put this case in a proper context.

As I think we've tried to set forth and convince the Tribunal, and I think as I said at the last hearing a year and a half ago, we view this as a fairly ordinary case, fairly ordinary type of international dispute. It involves a garden variety transgression which is simply economic protectionism. Economic protectionism rears its ugly head in a number of different contexts. It is certainly a staple of the international legal system as it has developed in the last 50 years. But just as importantly, it's a staple of various federal systems as well. It comes up repeatedly in the jurisprudence of the European Union. It comes up repeatedly in the jurisprudence of Canada, which is a federal state. And, of course, it comes up repeatedly in the jurisprudence of the United States as well.

And, simply put, it's a question of the inevitable tendency of local political powers to try to arrange things economically so that they benefit their own constituents, to the detriment of competitors who have no or, rather, a lesser voice in the political

process and who are less able to influence the political process to their own benefit.

This is a problem that has plagued federal systems for hundreds of years. It's a problem that has plagued the international system for centuries. And it's a problem that both federal systems and the international system have attempted to address in the last 50 years.

And, again, we view this dispute as firmly within the mainstream of that jurisprudence. What Methanex alleges here is quite simple. We start with the United States ethanol industry, which is one of the most heavily protected, heavily subsidized industries in the United States. I think the evidence is quite clear that it owes its very existence to government support. But for federal government support, but for local government support, it would not exist.

And in a free market, on a level playing field, ethanol cannot compete. It only wins market share when it is successful in convincing governments to give them market breaks they would otherwise not have.

And, again, what Methanex alleges here is that's precisely what happened in California, that the United States ethanol industry took advantage of these very minor leaks of MTBE to create an atmosphere in California

where they could ran through a political change to the benefit of the U.S. ethanol industry, also to the benefit of an in-State California ethanol industry, and to the detriment of ethanol's competitors, including producers of MTBE and methanol.

Now, the purported justification for this was environmental--not health, environmental, that the presence of MTBE in a very small number of drinking water supplies justified the State of California to single out and ban MTBE and then later to ban methanol.

Obviously, Methanex's position is that the purported justification does not survive scientific scrutiny, it's a pretense, and that what was happening here was that the ethanol industry was creating the political conditions, both before and during the time of the ban, in order to promote itself and in order to seize market share in California from its competitors, producers of methanol and Methanex.

So, again, we don't view this as any type of exceptional proceeding that will somehow result in circumscribing the sovereignty of any government, either California or the United States. We believe that this case can be resolved in accordance with the principles of law that have been developed over the years by the

international system and by various federal systems to cope with the problems of economic protectionism. And we believe that this is an area of law where the legal principles that should guide Tribunals are actually quite well developed. This has been a problem for so long in so many different contexts that the body of jurisprudence taken as a whole is fairly extensively established. And we urge the Tribunal to draw on that body of jurisprudence, both international and municipal, in order to ascertain the standards that should be applied to resolve this case of economic protectionism.

Economic protectionism by its nature is discrimination, and we think the heart of our case is this concept of discrimination, that California was discriminating. It was discriminating in favor of the ethanol industry and it was discriminating, by the same token, against ethanol's competitors.

And, again, as we tried to make clear in our submission, we view those as different sides of the same coin. To discriminate in favor of one competitor by definition disadvantages another competitor. We think there's also ample evidence in the record that California was very much aware of the detrimental impact that these regulations would have on methanol producers. The

meeting with Senator Burton made that clear, and the decision of California in 1999 and 2000 to ban methanol as well as MTBE, another potential competitor to ethanol, again makes it clear that California knew exactly what it was doing and it knew precisely what the detrimental impact of this ban would be and upon whom it would fall.

Now, in terms of the procedural issues today, the two most important, I believe, for Methanex are, first of all, the scope of the future proceeding and, secondly, the need to obtain additional evidence. As we set forth at considerable length in the second amended claim, we believe that, for the Tribunal to make a reasoned determination with respect to the existence of impermissible intent here, it has to look at all the facts, all the circumstances that are presented in this case; that there's no rational basis for picking and choosing.

And we set forth, again, I think the very well-developed principles and procedures of both international law and municipal law that, when dealing with a question of impermissible intent, the normal method of reaching that determination is inferential. It is to look at all the facts and circumstances, look at all the relevant facts and circumstances, the conduct of the various

actors, the background of the proceeding, the context in which a decision is made, the justification for a particular decision, the purported rationale. All of those factors are relevant to a determination as to whether or not there is impermissible intent; that the totality must be examined; and that if a Tribunal looks at anything less than the totality of the circumstances presented, it's not looking at enough, it's not weighing enough.

Now, in this case, we have a difference of opinion between the United States and Methanex as to precisely which issues should be evaluated by the Tribunal at the upcoming evidential hearing, and it's Methanex's position that all the issues raised by Methanex in its second amended claim must be considered by the Tribunal in order for it to reach a fair decision.

And I guess two generic, two broad categories of facts or issues I think are at issue. The first is the purported scientific justification for the ban of MTBE and then methanol, the UC-Davis report. Methanex's position is that there is no valid scientific basis for it, that other institutions that have examined this problem, including in particular the European Union, have not reached the same conclusion that California did, nor

did the U.K., nor did Germany, nor did Finland. And we submit that the reason for that is that the scientific evidence supporting an MTBE ban is very, very weak; and that but for the existence of the United States ethanol industry and the pressures that it created, the political pressures that it created, both at the grass-roots level and in the governor's office, there would not have been an MTBE ban; and that once the Tribunal scrutinizes the scientific justification for the MTBE ban, it will see that it simply doesn't hold up, especially when compared, as I said, to the actions of other institutions that have refused to ban MTBE.

Secondly, we think it's entirely appropriate for the Tribunal to compare the intended purpose of the MTBE ban and the methanol ban with the problem that it was meant to solve. And the problem that this was meant to solve was the presence in trace amounts in a very small number of drinking water sources of MTBE. And the cause of the problem was--as even the State of California admitted in promulgating the executive order, the cause of this problem was leaking underground storage tanks mainly and, in addition, the use of highly polluting two-cycle engines on drinking water reservoirs. Those were the causes of the problem. Those were the forces, the

factors that resulted in the presence of MTBE in the--in, again, in a very small number of drinking water sources.

Now, it's Methanex's position that if that was the problem, then the appropriate solution was to address those two issues, was to address the leaking gasoline tanks and was to address the use of two-stroke engines, polluting two-stroke engines on drinking water reservoirs. And that was by far the most appropriate way of dealing with this problem. And, in fact, that is what California has done.

In the intervening years since the ban was promulgated, the polluting two-stroke engines have been banned from most drinking water reservoirs, and the result has been a dramatic decline in the presence of MTBE in surface water sources of water. That problem has been virtually solved.

Secondly, as was known at the time when Governor Davis promulgated the executive order, a bare majority of California's underground gasoline storage tanks were in compliance with applicable federal and California regulations. There was a long-delayed program to bring them into compliance, and many agencies, including California agencies themselves, recognized that if the underground storage tank compliance program were

rigorously enforced, that the incidence of MTBE leaks into the water would decrease dramatically. And that's precisely what has happened.

The MTBE problem in California is on its way to disappearing because the two government measures that were most suited to correct the problem--cleaning up the reservoirs and enforcing the laws with respect to the tanks--are finally being implemented effectively. And the problem is virtually disappearing.

Now, if those are the two most effective remedies, why did California single out, first, MTBE and then methanol and ban them? It didn't solve the problem. It didn't solve the problem of leaking underground storage tanks. It didn't solve the problem of pollution on drinking water reservoirs. It certainly didn't solve the problem of all these other pollutants that are getting into drinking water sources. And I think--I know we included in our statement, in our second amended claim the list of the most serious pollutants that have showed up in California drinking water, and MTBE was not among them. Benzene ranked much higher. Benzene comes from precisely the same source: leaking gasoline storage tanks.

And why was it that MTBE was singled out and not benzene? Both are components of gasoline. One actually is a known and acknowledged carcinogen. That's benzene, not MTBE. And yet the State acted only with respect to MTBE.

We submit that the reason why it did was because of the political pressures that had been created by the U.S. ethanol industry to create a market for ethanol in California where none existed prior to that.

So we think that it's imperative for the Tribunal to consider that evidence. Was this measure enacted by California actually suitable, rational for its intended purpose? And if it wasn't, isn't the only inference that can be drawn from that lack of suitability an inference that there was an improper motive at work behind the scenes here?

We just don't see how the Tribunal can make a reasoned determination on the existence of an illicit motive unless it carefully considers those facts, the facts as to the purpose of the ban and the suitability of the measures to deal with the problem.

So I think those are the two scope issues, and they obviously make up much of the evidence that we submitted on January 30th that we think it's important

for the Tribunal to consider. It's more than important. We think as a matter of fairness and due process for the Tribunal to make a decision with respect to intent, it must consider those types of circumstances.

Now, the test that the Tribunal has set forth and that Methanex must meet, which is to show the intent of California, puts Methanex at a peculiar disadvantage because, in contrast to a test that would look at the disparate impact of the California measures, for example, a test that focuses on the intent of the actor necessarily is going to be premised on evidence that, for the most part, is within the control of the California agencies. Methanex has no access to this evidence. Methanex has no access to, for example, the internal documents of the California EPA, which at one point vigorously opposed an MTBE ban. It has no access to the documents of the office of the governor of California which might indicate what political factors went into that decision.

These types of evidence are outside of Methanex's control, and yet it is this type of evidence that Methanex needs to obtain access to in order to prove, in order to make out its intent case.

Now, I started off by saying that usually intent is an inference that's drawn from the totality of circumstances, from the circumstantial evidence that's available with respect to any particular decision. And that normally is the case, and Methanex firmly believes that the totality of the circumstances must be examined here.

But one of the purposes of why we have requested additional evidence is that it's entirely possible that this additional evidence will supply directly evidence of an impermissible intent. It's unusual in a case dealing with impermissible intent to find that type of direct evidence because it's unusual for actors who act in a manner that violates some type of legal stricture to leave any type of detail or cogent record of the actions that they are taking. But not always. In some cases it does happen.

I think the most notorious example for purposes of this Tribunal is the evidence that came forth in the S.D. Meyers case, which, again, was a case involving economic protectionism. That was the case that involved the remediation of PCB waste, and there was a U.S. company that had, I think, a fairly clear comparative advantage, comparative economic advantage in disposing of

this waste because of its long experience and because of its geographic proximity to certain PCB waste in Canada. And the Government of Canada was approached by the U.S. company's Canadian competitor, which was from the western part of Canada, and the Government of Canada agreed to protect it. It agreed to impose a ban on the export of PCB waste from Ontario to the United States so that the Canadian competitor of the American company could gain a foothold in the market, could compete effectively. And the evidence in that case, which was the internal correspondence of various departments of the Government of Canada, showed that clearly.

There was one particularly damning piece of evidence that said we ought not to put this agreement in writing, and the agreement that this particular minister or sub-minister was talking about was an agreement to protect the Canadian competitor.

That's the type of additional evidence, direct evidence, that Methanex is looking for in part from the State of California and from the various agencies in California. And, again, this type of evidence, evidence that would fairly conclusively prove the existence of an impermissible economic motivate in enacting the ban, is not within Methanex's control. And so as a matter of

simple justice, having articulated this test that intent is the controlling legal issue here, it seems that as a matter of fairness, the Tribunal should allow Methanex the opportunity to obtain this type of additional evidence, particularly in California, but also from the other actors who are involved--ADM, Regent, Mr. Vind, people who were players in this drama.

Affording Methanex that opportunity will be the fairest way of approaching this and will also be the best way of establishing and developing the record for this the Tribunal to act upon.

When Tribunals make decisions, any type of Tribunal, based on inferential--based on inferences, based on circumstances, the decision is usually not as strong as a decision that's based on direct evidence. I'm not aware of any dispute with the S.D. Meyers conclusion, the conclusion of that Tribunal, that there was economic protectionism at work here. The case has been hotly disputed on procedural grounds, but because of the existence of that direct evidence, no one disputes the essential conclusion there, that there was impermissible economic protectionism.

And Methanex, because obviously it firmly believes that that's what happened here, also believes

that if it's afforded the opportunity to obtain that type of evidence, the record of economic protectionism, the record of improper discrimination could be vastly strengthened, and that the record for decision for this Tribunal could be vastly strengthened. And it is for those reasons that it believes that obtaining this evidence is particularly critical.

Now, the final point with respect to that is that putting aside for a second the question of whether this is the type of Tribunal that falls within the ambit of Section 1782, which I think is most properly a decision for a U.S. court which has to interpret its own statute and act upon it, the United States argued long and hard for Washington, D.C., as the situs for this arbitration and, by implication, for the use of United States arbitration law as the lex arbitri here. This has been an element of the lex arbitri for quite some time. The idea that the courts of the United States would afford assistance to Treaty Tribunals has long been a part of U.S. law. And that's what Methanex believes this Tribunal is. It's a Treaty Tribunal. It's created by statute and international agreement. It's not a private international contract. It's something much, much different. And in these circumstances, we believe it's

always been clear that U.S. courts can give aid and assistance to proceedings before such Tribunals.

The United States insisted, successfully, on the selection of Washington, D.C., and the United States as the situs for this arbitration. Again, as a matter of foreseeable consequences and fairness, they ought to live within the consequences of that, that the United States is one of the jurisdictions that's most hospitable to allowing parties before a relevant international Tribunal to use the various vehicles available in the United States judicial system to obtain additional evidence.

It would be, Methanex submits, extremely unusual if in a case hinging on intent there were these available procedures out there that were known to the parties and the parties were not allowed to us them to find the type of evidence that they need in order to prove their case.

So, for all those reasons, Methanex believes it's very, very important to allow this additional evidence gathering to proceed.

Now, finally, there's a fairly significant difference between the proposed schedules of the United States and Methanex, and the United States envisions considerable more briefing in this case. Methanex's position is that the case has been--for a variety of very

justifiable reasons, including Methanex's own amendment, the case has been in existence for quite some time. Methanex is the claimant here. It's not a government. It doesn't have the resources of the various governments here. Methanex believes that the most appropriate way of dealing with this case expeditiously in order to fulfill the promises of international arbitration is to proceed as expeditiously as possible to the merits of the case, to the full merits of the case, to accord the parties an opportunity to obtain additional evidence and then to have a hearing on the merits of the case once the evidence is in, once additional witness statements have been prepared, including rebuttal witness statements, and then simply proceed with the hearing that will be necessary in one way or another here.

It clearly would not be efficient to carve up the issues in this case and have some type of sequential proceeding. The procedure that offers the most economical and fastest resolution, again, is to have a period of discovery that covers all issues and then to have a hearing that covers all issues. At that point the Tribunal will be in a position to rule on both the jurisdictional issues that it joined to the merits of the case and all the other issues that Methanex believes are

relevant to the ultimate disposition of, again, what Methanex believes is a garden variety claim of economic protection.

And so for that reason we set forth a fairly ambitious schedule in the response that we submitted last Thursday that envisions perhaps six months of attempts to obtain evidence, recognizing that that process may well be hampered by the resistance of the United States, followed by a period where the additional witness statements are prepared, including rebuttal statements, followed by, as soon as it can be managed, a fairly extensive hearing on all the issues presented in this case. And at that point the Tribunal will be able to issue a full and fair ruling covering all the issues presented by Methanex. And so that's Methanex's general position.

I think that covers, at least in summary form, all the issues that we had presented to the Tribunal. So if the Tribunal has any questions, I'd be happy to answer them.

PRESIDENT VEEDER: Thank you very much, Mr. Dugan.

We do indeed have some questions on the timetable you propose. As you've outlined it, you're

suggesting that all jurisdictional issues be joined to the merits and there be one joint hearing dealing with jurisdictional issues and merits issues together.

MR. DUGAN: Yes. And I think, again, just the reason for that is, to the extent that jurisdiction hinges on intent, we don't see how it's possible to divorce any set of issues from the question of intent.

PRESIDENT VEEDER: I follow your point. Let's come to 1782, which goes both, possibly to intent as a jurisdictional matter and intent as a substantive matter. Now, what do you see the timetable would be for that? Because you have to make an application if you were to make one to one or more district courts, and how would you see the timetable developing from the time those courts received your applications, tying it into a full hearing on the merits?

MR. DUGAN: Well, we would present--the application is ready to be filed tomorrow, if that were possible, and we would start off with an application simply to one court in order to resolve the anticipated legal objections of the United States and to get them resolved.

We would ask the court to render an expedited decision, which courts have done in this area. If it's

appealed, we would ask the appellate court--the Ninth Circuit in this case--to also render an expedited decision. And in these types of cases, appellate courts have acted remarkably quickly. They are, in my experience, responsive to the need to resolve these types of procedural questions so that a parallel proceeding can go forward in a relatively fast manner. And I would hope to have--if the United States intends to take these objections all the way up through the appellate system--and it's not entirely clear that they do. They have not yet taken a position on that. But if they do, I would hope to have that resolved in three or four months and then to have two or three months of intensive evidence gathering in California and possibly in Illinois, where Archer Daniels Midland is headquartered.

That's a tight schedule, and I realize it's a tight schedule, but that's what we try to make happen. We're prepared to put the resources in in order to--if we get the green light from the United States courts, to obtain the evidence on a multiple-front basis. In other words, we wouldn't necessarily--we wouldn't do it sequentially. We would try to obtain as much relevant evidence as quickly as we could from various of the actors in this drama.

PRESIDENT VEEDER: And as we've seen, your application on the 1782 would be looking at documents or individual witnesses from the Government of California.

MR. DUGAN: Yes.

PRESIDENT VEEDER: ADM, Regent, and possibly some other individuals.

MR. DUGAN: Possibly some other individuals, certainly Mr. Vind, who's associated with Regent. And if it came out during the course of the evidence gathering that there was a critical witness, then we would ask the right to take the evidence of that witness as well.

PRESIDENT VEEDER: Another question we had on your schedule was you suggest a full hearing in January 2004, which would take approximately eight days, and we wondered how you came to that calculation. Is that an educated guess?

MR. DUGAN: That's an educated guess. That's simply an educated guess. It's looking at the--and, again, in my experience--and if you feel differently, then obviously that would control. But I think one of the procedures that expedites an oral hearing is the presentation of detailed witness statements so that the hearing itself is limited to cross-examination of those witnesses who have put in detailed witness statements.

In my experience, that makes for a much faster hearing. In my experience, including in proceedings involving the State Department, the need for cross-examination is in many instances greatly reduced in those circumstances. Not every witness that puts in a detailed witness statement is subject to cross-examination. And those witnesses that do put in witness statements are often not subjected to hours and hours of cross-examination. It makes the procedure much more focused and much faster.

And it's for that reason that I think that the hearing could proceed relatively fast, but eight days really is nothing more than an educated guess.

PRESIDENT VEEDER: Do you have questions?

MR. ROWLEY: Mr. Dugan, you tell us that documents in the control of the State of California are unavailable to you. I am correct in assuming that there is no basis for obtaining access through access to information or freedom of information legislation?

MR. DUGAN: I think there is a limited basis for doing that, but, by far, the most expeditious way of doing that is through the evidentiary procedures. The power of the United States court to obtain relevant evidence is much broader than the power to obtain it

through Freedom of Information-type procedures in California.

MR. ROWLEY: When you say a limited basis, what do you mean? And have you taken any steps to use it?

MR. DUGAN: We have not taken any steps to use it, I don't believe, but, for example, one of the things that's typically excluded are interagency memoranda--intra-agency memoranda that set forth the deliberational process. That type of thing is ordinarily producible under U.S. evidentiary laws.

And, again, for example, what we would be looking for is a difference between the public position taken by California EPA at the time of the hearings on the UC-Davis report and their internal position. And, again, our basis for that is that there is a considerable body of evidence that is in the second amended claim that many of these agencies opposed an MTBE ban.

How their position changed as a result of the UC-Davis study is something we'd very much like to see. California EPA appeared to oppose it. The California Resources Board appeared to oppose it. The California Energy Commission appeared to oppose it. This was in '97 and '98. And their reaction to the UC-Davis report we think would produce very probative, very material

evidence for this Tribunal to judge precisely what was going on there.

Now, that type of intra-agency correspondence is typically not available under a Freedom of Information Act proceeding.

PROFESSOR REISMAN: Mr. Dugan, thank you very much for that very lucid explanation, particularly helpful to me as I've just joined the Tribunal. And I understand that your contention is that determination of intent necessarily requires inference from a broad context and that warrants joining the jurisdictional issues that are still pending to the merits and treating them as a single procedure.

MR. DUGAN: That is correct.

PROFESSOR REISMAN: Is there some prima facie threshold that parties seeking this would reach before a Tribunal makes that decision?

MR. DUGAN: Well, I'm sure there is. I'm sure there must be. But I guess--

PROFESSOR REISMAN: Then your position is that the evidence that you've submitted has reached that prima facie threshold.

MR. DUGAN: Long since, is our position.

PRESIDENT VEEDER: Can we ask you to turn to the draft application which you sent us on the 17th of March?

MR. DUGAN: The 17th of March or 17th of October?

PRESIDENT VEEDER: The 17th of March. The memorandum of law.

MR. DUGAN: I understand. Correct, yes.

PRESIDENT VEEDER: And at the very end, you have a paragraph D, Schedule of Requested Recovery.

MR. DUGAN: Right.

PRESIDENT VEEDER: And there you deal with Mr. Vind and Regent. Where do we find your intended request for disclosure of intra-agency documentation within the Government of California?

MR. DUGAN: They're not included in this particular request because if you look at the heading on this request, this would be filed with the Central District of California, which is in Los Angeles, which is where Mr. Vind and Regent International are headquartered. And, again, the purpose of a limited request at the beginning would be to focus the courts on the legal issues rather than the inevitable disputes about the scope of the evidence that we seek so that it could expeditiously resolve the legal issues. Is this

the type of international Tribunal that's covered by Section 1782? And is an affirmative request from the Tribunal actually needed? Those two key legal issues.

And we selected this one because I don't think anyone disputes that evidence--if this procedure is going to be allowed to go forward, evidence from Mr. Vind, evidence of Regent International Corporation are clearly relevant to what at least Methanex claims was taking place here, which was this concerted lobbying and public pressure effort to create the conditions whereby MTBE would be banned and ethanol would be substituted. Mr. Vind was at the heart of that process, as I think the evidentiary record clearly shows now, and finding additional information from him we think would result in relevant evidence.

But the main purpose is simply to do it in this fashion so that we can avoid any disputes about scope and focus on the threshold legal issues that any court would have to resolve.

PRESIDENT VEEDER: I understand that. Does that mean that there's another draft application or more than one with a different scope of requested--

MR. DUGAN: Yes.

PRESIDENT VEEDER: --discovery for ADM?

MR. DUGAN: Correct. The one for ADM would likely have to be filed in Illinois, which is where ADM is headquartered. And I know ADM is headquartered in Decatur, Illinois. I don't know whether that's the Northern or the Southern District of Illinois.

The applications for the evidence of the California agencies and the office of Governor Davis would have to be filed in the Eastern District of California, which is where Sacramento is. So it would take different applications in different parts of the country.

The obvious--the controlling issue there is that you must file an application in the district where the evidence is located, either the witnesses or the documents are. And so there are at least three districts identified.

PRESIDENT VEEDER: Do you have available, if we ask for it, any form of draft for the scope of requested recovery for the California government?

MR. DUGAN: No, we don't, but we can prepare that. We can prepare that quickly if that's what the Tribunal would like to see.

PRESIDENT VEEDER: Thank you very much indeed. That was very helpful.

Let's turn to the USA.

MR. CLODFELTER: Well, let me begin, Mr. President, by thanking the Tribunal for this opportunity to give our views on how this case should proceed. Mr. Legum will present our detailed views, but I would like to preface his presentation with a few observations.

First, we think the most appropriate way to proceed in this case is quite clear: rebuttal evidence by the parties on the issue of intent, to be followed by an evidentiary hearing on that issue.

It's not a question of whether or not this case falls within the mainstream of developing international law and economic protectionism. It's a question whether the measures at issue in this case relate to Methanex or its investment, as required by Article 1101 of Chapter 11 of NAFTA. It's a much narrower question.

Methanex has failed to provide any persuasive reason why, before this Tribunal has even determined that it has jurisdiction, the case should proceed to the merits on liability with all that that entails. Certainly the UNCITRAL rules express a preference for deciding jurisdictional objections as preliminary matters. Moreover, given the absence of any relevant evidence offered by Methanex, certainly the failure to

meet any reasonable prima facie threshold for joining jurisdiction to the merits, it would be unfair in the extreme to require the United States to undertake the significant effort that would be required to address issues which, if there is no jurisdiction, will never have to be reached.

The only way that Methanex can justify such a premature step is to distort what is meant by intent, that is, to broaden the concept until it blurs with issues on the merits. But to do eliminates any meaning to the concept at all.

Essentially Methanex argues that every foreseeable effect of a measure must be considered to have been intended, essentially equating foreseeable effects with intended results, or, in other words, reducing intent to a question of effects.

But the notion that a measure can be said to relate to an investor or an investment merely because that investor/investment is affected by it has already been rejected by this Tribunal. We think that the Tribunal meant something very different when it required proof of intent, and even though Methanex has argued that they are not required to show bad faith, they have proceeded to argue that circumstances suggest that the

measure at issue here were indeed adopted in bad faith. We think that bad faith is required in the facts of this case. And contrary to what Methanex has stated in its response, we do not deny that circumstantial evidence can be used to show intent in this sense.

We just believe that Methanex's circumstantial evidence falls far short of doing so. The inferences that Methanex would have you draw from the circumstantial evidence they have produced are simply too strained and alone cannot justify moving to the merits in this case until that evidence is assessed and the Tribunal's jurisdiction determined.

There is one issue on which we actually agree with Methanex. Heading 5 in their response states, "There is a clear need for additional evidence in this case." Well, this is all too clear. But the implications that we draw from this conclusion are very different from those drawn by Methanex.

Methanex believes that this lack of evidence is a warrant for a fishing expedition in discovery. The inferences Methanex wishes to support by such discovery are simply not probable enough to justify such discovery. The only rationale offered to justify it by Mr. Dugan this morning was that it is "entirely possible" that

direct evidence of impermissible intent will somehow emerge. But a mere possibility of such a result is not enough.

This, of course, is not a commission of inquiry but an adversarial proceeding and arbitration. We view the conclusion about insufficient evidence in a very different way. We see it as an admission of the lack of merit of the very allegation Methanex seeks to support.

In light of these facts, there are very good reasons why you should limit the next steps in this case to the issue of intent, as Mr. Legum will now explain.

MR. LEGUM: Thank you.

Mr. President, members of the Tribunal, it is a pleasure to appear before you once again. I have three issues that I would like to take up in turn this morning: the first is the very different general proposals for the conduct of the next proceedings in this case; the second is the merits of the different schedules or timetables proposed by the parties; and the third is this question of Section 1782 and, to use the word that Methanex uses, "discovery." I'll start with the first issue.

As outlined in our March 21st submission, the reasons supporting the United States' proposal for the

next phase of these proceedings is clear: efficiency and principle. I will address each of these in turn.

A hearing limited to the threshold issue of intent would be the most efficient way to proceed. The overwhelming majority of the allegations and evidentiary materials presented by Methanex have nothing to do with either Methanex or methanol producers. Instead, they concern either MTBE or MTBE's competing oxygenate, ethanol. Because methanol and MTBE are not the same thing, none of these materials shed light on the critical issue framed by the first partial award, whether California intended to harm or address not MTBE producers but suppliers to MTBE producers such as Methanex.

Now, Mr. Dugan tries to characterize this case as an ordinary case of economic protectionism. That argument might have some persuasive value if Methanex made the product that was banned. It does not, however. It is a supplier to the maker of that product, and for that reason Mr. Dugan's approach, we submit, is without merit.

Now, in order to get an understanding of the breadth of Methanex's allegations that have nothing to do with the issue of intent, I would direct the Tribunal to our supplemental statement of defense and, in particular,

page 16 and note 25. This footnote, Footnote 25, recaps in summary fashion hundreds of paragraphs of Methanex's second amended statement of claim. These paragraphs allege that MTBE is a better product than ethanol, that the California measures favor ethanol over MTBE, that ethanol would be the primary beneficiary of the MTBE ban and so on.

Methanex's six expert witness opinions and reports are to a similar effect. They exclusively address scientific issues surrounding MTBE and ethanol. None of these materials addresses methanol, methanol producers, or Methanex. None of these materials sheds any light at all on the question of whether California's purpose was to harm suppliers to MTBE producers.

Now, Methanex argues that all of its evidence and scientific materials on MTBE and ethanol, effectively everything in the record, is relevant to the issue of intent. Listening to Methanex's arguments this morning, I was reminded of the jurisdictional hearing in this room in July of 2001 when Mr. Rowley asked Methanex to identify the specific allegations in its draft amended statement of claim that it contended demonstrated an intent to harm Methanex or methanol producers. We then

sat here in this room and listened to Mr. Dugan conduct a reading of practically every paragraph of that pleading.

The Tribunal explicitly rejected that approach in its first partial award. It indicated that only quite specific evidence could, on the facts of this case, establish the intent required. In the first partial award at page 65, paragraph 153, the Tribunal noted Methanex's argument that it should from various facts draw the inference that Governor Davis--and I quote from that paragraph--"acted to favor ADM and the U.S. ethanol industry, and that Governor Davis also acted to disadvantage, relative to ADM and the U.S. ethanol industry, the foreign producers of MTBE."

In the next paragraph, in paragraph 154, the Tribunal held, and I quote again, 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.

Methanex's argument that every scrap of evidence and every allegation as to MTBE establishes an intent to harm methanol producers has not improved with age. The

Tribunal correctly rejected that approach in the first partial award, and it should reject it again today.

Because the evidentiary issues that are presented by the question of intent are, in fact, quite narrow, this issue may readily and rapidly be briefed and submitted to the Tribunal for decision. It is indeed a threshold and determinative question on which limited testimony could be adduced at an early oral hearing, as the Tribunal anticipated in paragraph 168 of the award.

Now, the second reason supporting the United States' position is one of principle. The United States has been subjected to over three years of litigation, encompassing no less than four rounds of pleadings, and at no point has Methanex ever even established the Tribunal's jurisdiction over the claim. This Tribunal has been, in our view, exceedingly generous in granting Methanex one last chance to attempt to plead a case within the NAFTA's investment chapter. That pleading, in our view, falls far short of doing so, and whether it has done so should be put to an early and final test. As a matter of principle, the Tribunal's jurisdiction should be determined before there is a full hearing on the merits.

I'd like now to turn to the subject of the relative merits of the schedules proposed by the parties.

The schedule proposed by Methanex, in our view, is both inappropriate and wildly unrealistic. It would take many more months than that schedule indicates to prepare this case for a full hearing on all merits issues. By contrast, the United States' proposal will have the issue of intent fully briefed and all evidence submitted by August 1, 2003, just four months from today. I briefly address each of the proposals in turn.

As I said before, Methanex's schedule is unrealistic. First, it provides the United States with 30 days to come forward with all of its evidence in support of its case-in-chief on all merits issues, including a response to Methanex's scientific expert reports. Preparing a response to evidence, that evidence in particular, will be costly and time-consuming. Doing so in one month is simply unrealistic.

Methanex had almost six months from the date of the first partial award to come forward with evidence in support of its case-in-chief. We anticipate that we would require at least that amount of time.

Second, although Methanex's schedule grants the United States 30 days to come forward with its evidence,

it grants Methanex seven months, until November 30, 2003, before its rebuttal evidence is due. This deadline in Methanex's schedule is drafted as if it applied to both parties, but this is really a farce. There are no intervening submissions of evidence for the United States to rebut, and, therefore, quite clearly we are not going to be coming in with evidence to rebut the evidence that we've already introduced in this case. The deadline seven months from now is a deadline for Methanex. It is not a deadline for the United States.

Third, Methanex's schedule provides for no further written submissions at all. Notably, it makes no provision for any full fresh pleading by the United States in response to Methanex's fresh pleading. Under the principle of equality of the parties, however, the United States is entitled to have an opportunity to submit a pleading rebutting the allegations in Methanex's second amended statement of claim that do not relate to intent. We note that Methanex took 90 days to submit its fresh pleading on all issues.

Moreover, it will be indispensable, given the breadth of the issues raised by Methanex's fresh pleading, to have reply and rejoinder submissions in order to narrow the issues for a hearing and provide an

opportunity to respond to any submissions in this case by third parties, such as Canada, Mexico, or the amici.

Methanex's schedule presumes that third-party submissions will go unanswered and allows no room for narrowing of the issues.

I understood Methanex this morning to argue that, for reasons of cost, further briefing in this case is something to be avoided. Our response to that is they have brought a $970 million claim against the U.S. Treasury in this case. Given the size of the claim that they have brought, it should be fully and fairly briefed and submitted.

In short, Methanex's proposal for a January 2004 hearing is not serious. It would take many more months to ready this case for a hearing on all merit issues.

By contrast, the U.S. proposal sets forth a fair, but rapid, schedule for bringing the issue of intent to a final resolution. We provide an opportunity for the parties to narrow the issues through a reply and a rejoinder, as well as an opportunity for the parties to respond to any third-party submissions. In short, our proposal, we submit, affords the most efficient and effective way to progress this case to its ultimate conclusion.

I'd like now to turn to the question of discovery in Section 1782. Methanex's attempt to seek discovery under Section 1782 in this case is both a waste of time and a fool's errand, in our view. The Tribunal should reject Methanex's request or, at a minimum, not permit any attempt to resort to that statute to delay these proceedings from reaching a prompt and efficient resolution. I will briefly explain why.

Methanex's request is a waste of time because it already has, and has had, access to the bulk of the documents sought in its request, to the extent that they even exist. Moreover, three of the persons who attended the August 4, 1998, dinner with Gubernatorial Candidate Davis have indicated their willingness to provide a statement and to be available to testify at a hearing.

Two of these people--Dick Vind and Roger Listenberger--appear in Methanex's list of proposed witnesses. Their request that those witnesses be compelled to testify is, therefore, moot because they have already agreed to come and testify.

Now, in Methanex's submission last week, it argued that it needed to review Mr. Vind's and ADM's documents concerning the August 4, 1998, meeting. Now, without expressing any view on the merits of Methanex's

request, we have, in light of that, contacted Mr. Vind and ADM. Mr. Vind has indicated that he will voluntarily provide any documents that he has concerning the August 4, 1998, meeting, and we don't have a definitive answer from ADM as of yet, but we hope to have an answer as to whether they will provide such documents voluntarily within the next couple of days.

Going to court under these circumstances, we submit, would be a waste of time, as well as inappropriate.

As for Methanex's request for documents from California, the California Government is one of the most transparent governments in the country and, I submit, in the world. Documents responsive to all of Methanex's requests are available to the public on the Internet.

Methanex offers no explanation as to why it needs to use Section 1782 to get documents that are already available to the public on-line, nor does it provide any explanation of why what is publicly available on the subjects that it is interested in is insufficient. Their assertion that they have no access to the evidence that is the subject of their requests is, we submit, not accurate.

Moreover, California has a Public Records Act that requires California agencies to respond to requests for information from the public. Methanex's counsel is fully familiar with this act, and, in fact, in January of 2001, Methanex's counsel used the act to make requests to a number of California agencies for any communications with ADM concerning MTBE, ethanol or other oxygenates.

We'd be happy to provide opposing counsel and the Tribunal with copies of these requests made by Nancy Kim, who is counsel of record in this case at Jones, Day, Reavis and Pogue, at their convenience if they would so desire.

The response, incidently, as we understand it from the California agencies, was that they had no such documents.

Methanex offers--

PRESIDENT VEEDER: Do you have a copy of that correspondence?

MR. LEGUM: We do.

PRESIDENT VEEDER: In due course, if you could show it to all of us.

MR. LEGUM: Very good.

PRESIDENT VEEDER: Thank you.

MR. LEGUM: Now, Methanex offers no explanation as to why it did not attempt to obtain documents through this act on all of the subjects in its request for discovery, rather than simply the subject that it did actually submit requests for in January of 2001.

The only explanation that we've heard this morning from Mr. Dugan was that, under Section 1782, what's known as the Deliberative Process Privilege would not be available. That is not correct. The federal courts have recognized a Deliberative Process Privilege for government documents, and that privilege would apply in the courts, just as it applies to requests for in under the Public Records Act.

Now, in addition to being a waste of time, Methanex's proposal to use Section 1782 is, we submit, a fool's errand. There are several serious grounds for doubt as to the applicability of that statute here, and it would likely take years of litigation in the U.S. courts before even the applicability of the statute could finally be resolved.

Now, the Tribunal is already familiar, from the parties' correspondence, with the basic question of whether the statute applies at all to international arbitration tribunals such as this one. Clearly, Section

1782 is part of the lex, the law of the United States. There is an issue that could be in dispute, however, as to whether it is part of the lex arbitri of the United States.

This ground would apply to Methanex's proposal for discovery from every single one of the witnesses that it proposes. There are, however, two other serious reasons for doubt as to the statute's applicability that apply uniquely to the California agencies and officers identified in Methanex's request.

First, the United States Court of Appeals for the District of Columbia has held that the United States is not a person subject to discovery under Section 1782. The term that's used in the statute is "person." You can seek discovery under the statute from any person within a certain judicial district.

The United States Supreme Court has in other contexts, in the context of other statutes, also interpreted the word "person" as not including state governments or including officials of foreign state acting in their official capacity. There are, we submit, obvious, unresolved questions as to whether California, its agencies or its officers are persons within the scope of Section 1782 and therefore subject to the statute.

In addition, the Eleventh Amendment to the United States Constitution precludes federal court jurisdiction over, and I'm quoting the amendment, "any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state."

The action that Methanex proposes to initiate in federal court could be viewed as a suit for specific injunctive relief, as against the California agencies and officers that Methanex proposes to compel. It could be viewed as violating the Eleventh Amendment, and therefore constitutionally precluded.

Moreover, even if these serious questions as to whether Section 1782 even applies were ultimately to be resolved in Methanex's favor, it is still within the Court's jurisdiction to deny discovery. It has long been established, under United States law, that for reasons of public policy, high-ranking government officers may not be compelled to testify unless that information is unavailable from any other source. That is simply not the case here.

Finally, I would agree with Methanex that there is an immediate appeal as of right under Section 1782 because they are considered to be separate proceedings.

The Federal Court of Appeals with jurisdiction over California is one of the busiest courts in the country, and it typically takes more than a year for appeals in that court to be resolved.

Mr. Dugan, throughout the figure of three to four months, I, personally, when I was in private practice, litigated several Section 1782 cases, and my own experience was radically different from what Mr. Dugan's experience was. It took over a year to resolve each one of those cases. And whether the Ninth Circuit would grant expedited review under these circumstances is very much an open question.

In conclusion, given the novelty and the seriousness of these questions of law and the prospect of one or more appeals from any lower court decision on this subject, there could be years of litigation before the statute's applicability is finally resolved.

Now, I'd like to note a couple of other points before closing.

First, we wish to note our annoyance at Methanex's gamesmanship on these requests for discovery.

Last fall, Methanex asserted that the Tribunal had authority under the IBA rules, specifically Rules 3.8 and 4.10, and that it was necessary for the Tribunal to

order discovery from these witnesses because they, and I'm quoting Methanex's September 30th, 2002, letter to the Tribunal, these witnesses "will certainly not be willing to appear voluntarily at Methanex's request."

In its January 30th, 2003, letter to the Tribunal, Methanex took the position that the provisions of the IBA rules that it relied on last fall don't apply at all, and it can get these discoveries, the discovery from these witnesses voluntarily. In fact, Methanex accused the United States of misstating its position and omitting critical language from those IBA rules in suggesting that the articles even applied.

Under the new position stated in Methanex's January 30th letter, there would be no occasion, under the IBA rules, for the Tribunal to address Methanex's discovery requests because there is no cause for the Tribunal to order discovery from a witness who will appear voluntarily.

Then, in its communication of last week, Methanex seems to reverse course yet again and assert that it does rely on Sections 3.8 and 4.10 of the IBA rules and does need and require the Tribunal's blessing, but even this position is not clearly stated.

Now, we don't believe that Methanex's January 30th letter reads the IBA rules correctly. A witness who is compelled to testify by a court is not ordinarily thought of as appearing voluntarily at a party's request, but if that is, in fact, Methanex's position, there is certainly no reason to hold up these proceedings so that Methanex can collect testimony from witnesses and documents that are available to it on a voluntary basis.

One final note on this subject. We understand the subject under current discussion to be Methanex's proposal to resort to Section 1782 and to what extent that should be factored into the schedule for the next phase.

We have, therefore, refrained from addressing the merits of Methanex's request under the IBA rules. Let me be quite clear, however. The United States views Methanex's requests for discovery as the type of fishing expedition that is expressly prohibited by the IBA rules. We have much more to say on that subject. We'd be pleased to do so if, and when, the Tribunal requests it.

I think that pretty much concludes what I have to say on the three principal topics. I would just note for scheduling purposes that there are three minor--relatively minor--procedural issues on which the parties

have reached either whole or partial agreement that we should bring up at some point during the proceedings.

PRESIDENT VEEDER: Why don't you raise those now.

MR. LEGUM: The first is really quite minor. In normal ICSID proceedings, ICSID acts as a conduit for communications between the parties and the Tribunal. We haven't followed that procedure here because of the history of the proceedings. I think, if it's convenient for the Tribunal to follow that procedure, it would be convenient for the parties.

From our perspective, it would be more efficient to deliver one package of materials to ICSID for distribution to the Tribunal rather than have packages flying in different directions directly.

PRESIDENT VEEDER: [Off microphone.] [Inaudible] provide correspondence as well [inaudible]?

MR. LEGUM: At least for the United States, we are open to what the Tribunal thinks is best, but our main concern is on major submissions.

PRESIDENT VEEDER: That was the first issue.

MR. LEGUM: The second issue on which I believe we have agreement is the substantive hearings in this case, the parties have agreed to follow the procedure in

the recent hearing in the UPS case of opening those proceedings to the public via closed-circuit TV feed from the hearing room.

PRESIDENT VEEDER: [Off microphone.] [Inaudible.]

MR. LEGUM: Yes.

PRESIDENT VEEDER: But people wouldn't be physically within this hearing room.

MR. LEGUM: That's correct. They wouldn't be physically within the hearing room, and yet there would be a closed-circuit TV feed to another room elsewhere in the building.

And then, finally, the parties have reached significant agreement on what the proper procedures for amicus submissions should be. There is one area of disagreement between the parties that would require a decision from the Tribunal that might be worth having brief argument on at some point.

PRESIDENT VEEDER: Shall we come back to those three items, but I'm very glad to hear that there is agreement emerging on those items from the parties.

MR. LEGUM: Very good.

PRESIDENT VEEDER: I think, at this stage, Mr. Legum, if we can ask you to turn back to the IBA rules,

because that was the subject of correspondence, also, between the Tribunal and the United States, and just see whether there's an issue on the United States' interpretation of Article 3, Rule 8. And this is the rule that provides that "if a party wishes to obtain the production of documents from a person or organization who is not a party to the arbitration and from whom the party cannot obtain the documents on its own, the party--" and let's assume that's Methanex "--may, within the time ordered by the Arbitral Tribunal, ask the Arbitral Tribunal to take whatever steps are legally available to obtain the requested documents."

Now, in this arbitration, with this particular situs, this Tribunal has no power--or does it--to order ADM to produce documents to the Tribunal at the request of Methanex; do you accept that or do you take issue with that?

MR. LEGUM: It has no authority by itself to compel ADM to produce documents. But if you read on down to the last sentence of paragraph 8, it says, "The Tribunal shall decide on this request and shall take the necessary steps if, in its discretion, it determines that the documents would be relevant and material."

At least our understanding of that provision is that in a circumstance that it's designed to permit the Tribunal to take advantage of procedures for judicial assistance to arbitrations, and therefore, while the Tribunal itself has no authority over ADM, it could authorize or take the necessary steps if it determines it relevant and material for a Court to order ADM to produce the documents as one example.

PRESIDENT VEEDER: Apart from 1782, do any steps exist?

MR. LEGUM: The only other one of which I'm aware is Section 7 of the Federal Arbitration Act.

PRESIDENT VEEDER: Would that apply to ADM in Illinois?

MR. LEGUM: Only if the Tribunal would hold a hearing there.

PRESIDENT VEEDER: Well, physically we could hold a hearing there, but the legal place of the hearing we fixed is Washington, D.C., haven't we? Would that work?

MR. LEGUM: There's relatively little jurisprudence on the subject, so I can't say for sure whether that would work.

PRESIDENT VEEDER: Is there any question you'd like to ask?

PROFESSOR REISMAN: I'd like to ask a question of Mr. Clodfelter. I'm going back to the issue that I raised a moment ago with Mr. Dugan. Again, this is for my edification. It may very well be something that has been clear to my colleagues on the Tribunal.

With respect to the prima facie test that would be reached with respect to joining a jurisdictional question to the merits, and I understand that Mr. Dugan agreed that there is some threshold, is the point that you were making in your introductory remarks that that has not been reached because inferences with respect to many features of the context move one back to the language of affecting, rather than relating to?

MR. CLODFELTER: Well, more precisely, I think there is a threshold. We certainly agree with that, and it's really a question of likelihood; that is, taking what reasonable inferences can be drawn by proffered circumstantial evidence, is there a sufficient likelihood that there would be direct evidence along the lines proposed by the proponent?

And we don't think any reasonable measure of that likelihood is present in this case. By any reading,

the circumstantial evidence offered by Methanex falls far short of suggesting any probability that there's direct evidence of impermissible intent.

They have made no effort to show why those inferences are more probable than other inferences or even enjoy any measure of probability, and I think that's well admitted today, when Mr. Dugan admitted that it's just possible that they might, and that's just not enough. There's not enough to burden the United States, there's not enough to interrupt these proceedings. It's not enough to justify departure from practice of arbitration, which is against wide-open fishing expedition-type discovery.

MR. ROWLEY: Mr. Clodfelter, I wonder if you can help me with the question of whether the United States, as respondent to these proceedings, has the ability to require California or its agencies or its officials to produce documents.

MR. CLODFELTER: Mr. Rowley, I'm going to confer for a moment, if I might.

[Pause.]

MR. CLODFELTER: As a legal matter, we would have no ability to compel California to produce those documents.

MR. ROWLEY: Just one further question--I think it is to Mr. Legum--on the California public records legislation.

I gather you tell us that there is a deliberative process privilege. Does that privilege extend to the protection of an individual's files where he or she makes notes of factual interactions over a period? Can you explain a bit better to me what is available under that act and what is not?

MR. LEGUM: With your permission, I would prefer to consult with my colleagues from the Department of Justice and, the California Department of Justice, and provide you with a more informed response to that question. It's an issue that those agencies deal with on a regular basis, and I personally do not. Would it be all right if we did that, and perhaps after the coffee break reported the results?

MR. ROWLEY: That would be very helpful.

PRESIDENT VEEDER: What we suggest to the parties is that we break now for about 15 minutes, if that's long enough, and we'll resume. Perhaps you could resume, Mr. Legume, with your answer to that particular question, and it would then be helpful if, in fact, Methanex could respond to the submissions made by the

United States, and we invite the United States also to make a final reply. In the meantime, we'll be also thinking about various issues that have arisen this morning.

Could we ask that certain documents be provided? We're interested in the reply from the government of California to the requests made by Jones Day for documentation. If that were made available during the coffee break, obviously, to Methanex and to the Tribunal, we'd be grateful.

I think, in addition, in consultation with your colleagues, Mr. Legum, we were told the U.S. couldn't compel the government of California to produce documents. If we can extend it from documents to individual witnesses who were offices of the government of California, we'd like an answer on that, but after the break.

So let's break now. It's almost 11 o'clock. Let's resume at 11:15, if that gives you enough time to do what you have to do.

[Recess from 10:58 a.m. to 11:26 a.m.]

MR. DUGAN: My apologies. I simply lost track of the time. We were downstairs talking. I didn't look at the clock, but I apologize. I didn't mean to be late.

I would just like to respond to a few of the points that the United States raised.

PRESIDENT VEEDER: But before you do that, if could just give Mr. Legum a chance to respond to the questions which were raised by the Tribunal.

MR. DUGAN: Oh, I'm sorry, of course.

PRESIDENT VEEDER: Mr. Legum.

MR. LEGUM: I have a definitive answer on the federal side, but Ms. Durbin is not a specialist in the California Public Records Act, so I can't provide a definitive answer there, but I can provide an indication.

Under the federal law or the federal rules that apply, the deliberative process privilege is one that applies to information. It does not apply to documents. So, for example, if you had a document that contained some portions that merely stated the facts, and another portion stated a view in aid of government deliberations on the issue in question, then the part that would be subject to the deliberative process privilege would be only the latter part.

So what would happen, at least under the federal rules, is a document would be produced that had only the parts that were specifically covered by the privilege redacted. Now, while I can't provide a definitive view

as to what California's approach would be, as a general rule, I am told, California's act is based on the federal act and intends to follow federal jurisprudence on the area, but we can provide a more definitive response at a later date if the Tribunal wishes.

Also, I have now provided to ICSID staff, for photocopying, correspondence concerning a request made by Ms. Kim of Jones, Day, Reavis and Pogue, under the Public Records Act, to the State Water Resources Board.

My understanding is that there were other requests that were made to the California Environmental Protection Agency and possibly other agencies as well. So this should be taken really as a sample, rather than as a definitive set of correspondence.

PRESIDENT VEEDER: Before you respond, Mr. Dugan, it may be convenient if we just talk briefly with the three matters that were raised by way of agreement between the parties.

First of all, we're absolutely content to have the hearing not in camera in the way that the parties have suggested; that is, that we have our hearing, but there will be a video link feed to a public hearing room, and as far as the Tribunal is concerned, if the parties are happy, we're happy to do that.

We suggest that this be minuted either in exchange of letters between you and the Tribunal or we can incorporate some agreed wording into our next procedure and order.

The other matter that was raised, which was the use of ICSID as a conduit for communications. We're happy again to fall in with the parties' suggestions, certainly as regards bulky submissions. We had a query as regards mere correspondence, as to whether that was something you were suggesting should only go through ICSID or whether it should still continue to go to members of the Tribunal.

Why we're concerned about that is that, for example, the submissions on Friday, if they'd been sent through ICSID, we probably wouldn't have received them in time to prepare for today's hearing.

There are other requirements of speed which may make it more attractive sometimes for letters to be sent directly through to the Tribunal. But, again, if we can just explore with you as to what you intended.

MR. LEGUM: Well, perhaps it would make sense for correspondence for us to continue to send via electronic format directly to the Tribunal, for example, by e-mail or by fax, but simply send a hard copy to ICSID

for the permanent file; does that make sense, do you think?

PRESIDENT VEEDER: That was I think what was in Tribunal's mind. If you could send things by e-mail or by fax, that would eventually reach us fairly swiftly, whereas, you can send the hard copies of correspondence through ICSID. If there's some difficulty in our receipt of a document by e-mail or by fax, we can always pursue it with the ICSID Secretariat.

Now, is that convenient to Methanex, Mr. Dugan?

MR. DUGAN: That would be convenient to Methanex.

PRESIDENT VEEDER: What we also found very, very useful is when you--I beg your pardon?

MR. LEGUM: Could I make just one question? Mr. President, you referred to submissions on Friday. Were you referring to the exchange concerning late attendees at the hearing or--

PRESIDENT VEEDER: No, I was referring to an exchange probably on Thursday. What was the date of the response from Methanex? Wednesday, fine. I was referring to Wednesday. I beg your pardon.

MR. LEGUM: Thank you for the clarification.

PRESIDENT VEEDER: There are no dramatic hidden submissions.

But e-mail moves onto electronic versions of documentation. We found that very helpful when you send electronic versions of your documents, either by e-mail and CD-ROM, and we'd certainly like to encourage that.

When it comes to CD-ROMS, would you prefer to send that to ICSID for distribution to us or do you want to send that to us? Again, we're happy with whatever you're happy with, so we just raise it to establish the procedure.

MR. LEGUM: We prefer to send it through ICSID, if that's acceptable.

PRESIDENT VEEDER: So let's treat--is that okay?

MR. DUGAN: That's fine. I was just going to suggest, I mean, it is very easy for us, for the filings themselves, to be sent electronically, no matter how bulk, but it may be useful that if the, if we could call it the file copies, the complete hard copy be distributed, to the extent that it is, through ICSID, and then have ICSID distribute the CD-ROMS as well, but as a matter of course, provide an electronic version of all correspondence because it is so easy to do.

PRESIDENT VEEDER: Let's do it that way, then.

So as I understand it, we'll have all bulky submissions sent to ICSID, CD-ROMS sent to ICSID, but as regards correspondence, that would still come electronically by fax or e-mail to members of the Tribunal with a hard copy going to ICSID. Let's do that. We'll come to a meeting later.

Mr. Dugan, you have the floor.

MR. DUGAN: I was just going to say the third point, with respect to the procedures for the amici, I just wanted to raise the issue, and we generally agree with the procedures that have been suggested by the Department of State about how the amici should make submissions.

The one disagreement we have is that the government wants to be able or the government wants amici to be able to make factual submissions, and one of the exemplars that they provided was the decision of the World Trade Organization with respect to the asbestos case.

And in that case, and in many other cases, amici submissions are allowed, but not on factual issues; that they're limited only to legal issues, and that is the line, the distinction, that we would like to draw in this case as well. We don't think it's appropriate to burden,

private complainants with the obligation of responding to factual submissions by nonparties that may or may not be relevant to what's going on, and so that's the area of disagreement that we have with the United States with respect to the amici submissions.

PRESIDENT VEEDER: Whilst we're on that, I think we need ourselves to look back to the wording of our decision on the amici. As I recall, it was limited to expert submissions, but I may misremember the wording of the order. In due course, when we come back, if we can dig out amongst ourselves a copy of that order.

MR. DUGAN: All right. In rebuttal to the points that were raised by the United States today, I will try to take them more or less sequentially. It may be a little disjointed, but I'll try to make it as focused I can.

First of all, with respect to the "relating to" decision of the Tribunal and the question of foreseeability, the Tribunal said it will not allow any party that is merely affected by a particular government measure to have standing to bring a claim; that the gatekeeping function of 1101 would have to provide a more common-sense limitation.

We believe, and I think, again, we set this out in our Second Amended Claim, that the concept of "foreseeability," when connected with the concept of "relating to" performs just that kind of gatekeeping function.

PROFESSOR REISMAN: Sir, could you speak a little louder please.

MR. DUGAN: Sure, that the concept of "foreseeability," when combined with the concept of "relating to," provides just that type of gatekeeping function. It provides just that type of legally significant connection. The concept of foreseeability is recognized in many areas of the law as providing the type of connection that allows a harm to be remedied.

And the point that we're trying to make with respect to the facts of this case is that the harm that was suffered by foreign methanol producers, including Methanex, was expressly foreseen. It was not only foreseeable, it was indeed foreseen. It was foreseen by the United States in the mid-1990s, and again this is all in the second-amended claim, where it laid out what it thought would be the primary consequences of an ethanol, a mandate to use ethanol.

And one of the consequences it identified would be harm to foreign methanol producers, number one.

Number two, the evidence with respect to what Senator Burton said makes it quite clear that at the time of the ban, he at least foresaw the harm that would be inflicted on Methanex, in particular--the advice to sell Methanex's stock short is as express and as graphic a description of foreseeable harm as I could possibly conceive of.

So our point with respect to foreseeability and how that relates to the gatekeeping function of 1101 is that, if a particular harm is foreseeable by the actor that implements the measure, then that type of harm is within the ambit of 1101. That type of harm is the type of legally--that type of foreseeability is the type of legally significant connection that will allow a person so harmed to bring a claim under NAFTA.

PROFESSOR REISMAN: I thank you for that explanation, which is very helpful, but I'd like to make sure that I understand that foreseeability is not then equivalent to effects.

MR. DUGAN: Correct. The effects would have to be, in terms of the common-sense, real-world limitation of what is actionable, for example, only those harms that

are foreseeable would be actionable. Only those harms that are foreseeable would meet the "relating to" test. Again, this concept is drawn from the concept of intentional torts; that those harms that are foreseeable are the types of harms that are actionable; that the concept of foreseeability does serve the same type of gatekeeping function.

PROFESSOR REISMAN: Just, again, and I apologize for interrupting you. I'm trying to catch up very quickly in this very difficult case.

You also say "foreseeability" and you say "expressly foreseen," so, as I understand it, affects is a very big universe, foreseeability is a smaller universe, and expressly foreseen is a much smaller one.

MR. DUGAN: Yes, I think that's right.

PROFESSOR REISMAN: If I can just ask, now, and you keep referring to Senator Burton as someone who expressly foresaw.

MR. DUGAN: Yes.

PROFESSOR REISMAN: So we're to understand that that's what "expressly foreseen" means.

MR. DUGAN: Correct.

PROFESSOR REISMAN: Thank you.

MR. DUGAN: Exactly; that when Senator Burton told representatives of Methanex, just prior to the time when the MTBE ban was implemented, that they were, and we use the euphemism "out of luck," it was a much stronger statement, that he foresaw the harm that would be inflicted on Methanex and other methanol producers by the MTBE ban, and that because there is that evidence that he actually foresaw it, there should be no dispute as to the foreseeability.

So, in this case, the fact that it was foreseen makes the concept of foreseeability contiguous with the concept of foreseeability. Did I explain that correctly or did I get caught up in my own words?

Secondly, with respect to the assertion by the United States that our request for additional evidence is an indication that we do not believe we have additional evidence now, that couldn't be farther from the truth.

We believe that the evidence that we have submitted in the second-amended claim, and the attachments thereto, in the documentary record, in the expert evidence that was submitted and the additional factual evidence that was submitted at the end of January is far more than sufficient for this Tribunal to infer that economic protectionism was at work here; that the

reason why ethanol obtained the market in California was because it, like it has in every other setting in the United States, not every other setting, but in so many other settings in the United States, successfully manipulated the political process to create a market that it could not obtain on its own, and that by doing so, it harmed and disadvantaged all of ethanol's competitors, including producers of methanol, which competes with ethanol, and including producers of MTBE.

And the evidence is there already. We are simply asking for additional evidence so that we could make the record even stronger, so that any decision by this Tribunal will be more strongly based on the best-possible evidence, but in no way do we concede that the evidence that exists now is not sufficient for this Tribunal to reach the conclusion in favor of Methanex. We believe the that detailed evidence is already there.

Next, the government said at one point that Methanex's product was not banned by California. Well, as we have said, that's not true. Methanex's product, methanol, was indeed banned for use as an oxygenate in California by the California Air Resources Board in 1999 and 2000. They specifically excluded methanol from consideration as an oxygenate. They did not bend over

backwards to accommodate methanol in the same way that they bent over backwards to accommodate ethanol. So it was banned.

Now, with respect to the types of circumstances that are relevant here and what this Tribunal should look into, the United States, in its submission of March 21st, offered up this evidence that there could be no intent on the part of California to harm Methanex because California had selected Methanex as a partner in the fuel cell program that California is developing.

And Methanex submits that that proves our point precisely. If that type of circumstantial evidence is relevant to a determination whether California was acting with impermissible intent, then surely evidence that directly relates to the MTBE and methanol bans is itself far, far more relevant; that those circumstances are far more probative, far more material, in terms of inferring, in terms of determining whether or not California acted with impermissible intent here.

It precisely proves Methanex's point that the totality of the circumstances must be adjudicated, must be evaluated by a Tribunal in reaching a decision as to whether or not there was impermissible intent.

Next, in terms of the types of evidence that we're looking for, we're not looking for public record evidence. We spent al to of time and a lot of money, and I think the fruits of that time and money are apparent in the detailed nature of the claims that we've put forward. We have examined the public record very, very carefully.

The evidence that we're looking for is what's not on the public record, and we think that that evidence--again, let me make myself clear that the evidence that's on the public record we believe is sufficient to sustain a judgment by this Tribunal that California acted with the intent of protecting the ethanol industry and disadvantaging ethanol's competitors.

But beyond that, what we are seeking, in essence, is the nonpublic evidence; the evidence that we cannot obtain without some type of judicial process.

Now, the United States offered that Mr. Vind would produce a very limited set of documents with respect to what took place at the secret meeting in Decatur in 1998, but what Methanex is seeking is something far--it's seeking much more in the way of the evidence of Mr. Vind and Regent International, their participation in the political process in California, not

simply that one meeting, and there was no proffer of any evidence with respect to that.

We think the record that's already been developed and that has been presented to the Tribunal quite clearly shows that it was Regent International and Mr. Vind that were very much perhaps even leading the process of creating the anti-MTBE sentiment that existed in California. They were one of the primary moving actors in that whole political process, and it's that relationship between Vind, and Regent International and the political process in California that we would like to obtain more evidence of.

Some of the evidence that's been submitted shows that Mr. Vind was in contact, telephone contact, with Governor Davis's office, even with respect to donations. We'd like to find out what those contacts were, what was said, who promised what, if anything, what was promised in return. Those are the types of things that we would like--that's the type of evidence that we would like to obtain because we think that type of evidence, Vind and Regent International's direct participation in the political process in California, is very probative evidence of whether this decision by California was politically motivated to protect the U.S.

ethanol industry, and that's what we're looking for. It goes far beyond any evidence that Mr. Vind might have with respect to the secret meeting in Illinois.

PRESIDENT VEEDER: Sorry to interrupt you, but in the draft application in relation to Mr. Vind, you have a brief description at the end of the document, at Page 13, on the Scope of Requested Discovery. For the kind of detail you've just referred to, is that in Appendix 7 or Attachment 7, which I don't know if it exists, but we don't have it I think, as supplied in this draft.

MR. DUGAN: We didn't supply the attachments, I don't believe.

PRESIDENT VEEDER: Don't worry about it now, but if there's some document you can show us which specifies the kind of detail to which you've just referred--

MR. DUGAN: There is no document, but when we would create--we just simply haven't done it yet. We haven't compiled it, but that would be the type of, the process when you survey a subpoena duces tecum, under Rule 45, on a nonparty witness, a combination of that and what's called a Rule 30(b)(6) subpoena, where you require a corporate representative to come forward and to testify about various subject matters, you have to detail the

subject matters that you want the corporate representative to testify to, and that's part of the subpoena process, and we haven't gotten around to drafting that simply because we haven't yet had the permission to go forward and do that.

But that would be part of the process, and the process requires that the 30(b)(6) subpoena spell out in enough detail what is being requested so that the corporation can supply a witness who can respond on those subject areas. It's not a set of questions, it's just a set of subject matters to give the witness notice.

And, again, in our, I mean, the way we set it forth in our October request was just documents related to Regent or Vind that could demonstrate coordinated efforts to influence the decisionmaking process underlying the measures in California.

So it's that that we're looking to, it's not just merely this one secret dinner. I mean, I can anticipate that we would come back, that what we would be provided with by the United States is a very small set of documents that's entirely innocent. I mean, the whole purpose of this type of evidence-gathering process is to be able to gather documents so that the credibility of a

witness can be tested, so that if he can be impeached, he will be impeached.

And I think that the concept of providing documentary evidence that's relevant to the testimony of a witness is recognized in most countries, including the United Kingdom and in Canada, and it's that type of documentary evidence that we need to test the credibility of the witnesses that the United States is proffering--Mr. Vind, certainly.

We would be at a severe disadvantage in testing the credibility of his testimony unless we were provided with relevant documents that demonstrated, contemporaneously, what was happening at the time that he says it was happening, and I think that type of production of potentially impeaching evidence is critical to the cross-examination of hostile witnesses. Of course, there's no doubt that Mr. Vind would be a hostile witness here.

And I think that concept of producing documents necessary for impeachment of hostile witnesses is an accepted feature, not just of the United States system, but of the U.K. system and the Canadian system as well.

So those are the types of documents that we're looking for, with respect to Mr. Vind, and those

documents have not been offered by the United States, and undoubtedly will not be. And even if they were, there's no rational basis for requiring a party to rely on the good faith of a hostile witness to produce the appropriate documents for impeachment.

I think human nature and common sense dictates that a party that is not under legal compulsion to produce everything, such parties have a tendency not to produce everything. They tend to cut and trim as to what they believe is relevant and to create justifications for not producing all of the relevant documentation that can be useful in proving a point or impeaching a witness.

Now, with respect to the requests for, under the California Public Records Act, I had forgotten this morning that we had requested those, and I haven't had a chance to look at that. My recollection is that we found the process to be unsatisfactorily. I'm not entirely sure of that, and I will go back and I will check the record more thoroughly, just to make sure exactly what conclusion we came to, but I know we did, I mean, and I am reminded that we did, in fact, try to use this process.

I believe that, to a degree, Governor Davis's office was not required to respond to these. I'm not

sure why, and it'll be part of what I will go back and try to check and get back to you, but I know I believe my recollection is that's one of the reasons why we found it to be unsatisfactory.

In terms of the deliberative process, the United States Government has always taken the position that the deliberative process applies to the evidentiary processes of the United States.

My recollection of the law, and this is not an objection that they proffered before this morning, my recollection of the law is that this is a disputed area and that, certainly, with respect to FOIA, there is a deliberative process, but with respect to responding to subpoenas, I am not at all sure that the deliberative process has been recognized by the appropriate courts, and that's a decision for the courts to make, not for the United States Government to make.

And I believe that there have been many instances, where courts have ordered government agencies to produce documents that were exempt from disclosure under FOIA, but were not exempt from production as evidence pursuant to a subpoena. But, again, we will check up on that and try to get back to you with a definitive position on that.

MR. ROWLEY: Mr. Dugan, the use that has been made to date of the California Public Records Act, and thank you for saying that you will revert to us on that, I think it would be helpful if the Tribunal understood the details of the use that was made, the scope of the application or reach, the reasons it was found unsatisfactory, if it was, and what, if anything, was done about that, if anything was done about it, and so on.

MR. DUGAN: I will do my best to try to dig out those facts.

The one thing that I do remember is that our first request for evidence, to be allowed to use evidence-gathering procedures, was made in May of 2001, after we had started this process, and I'm inferring from that that we came to the conclusion that the California Public Records Process would not be a sufficient method for obtaining the evidence that we thought we were entitled to, but I will go back and check on that.

Now, as to the other objections that were proffered by the United States this morning, that the state governments may not be a person under Section 1782, again, my understanding of the law, as to who is and who is not a person, is that that is "confused" may be too

strong a word, but it is an area of the law where different decisions are reached by different courts in different contexts, and I don't know what the law is with respect to 1782. I just don't know.

With respect to the constitutional prohibition, the Eleventh Amendment, of suits against states, I don't believe this would be deemed to be a lawsuit against the state. I think this is some type of ancillary proceeding that would probably fall outside the ambit of the Eleventh Amendment prohibition, but again I'm not certain of that. That's just my initial reaction to it.

In terms of timing, my statement with respect to timing was based on two data points; one is that one of the cases that has been cited to the Tribunal is the Biederman case in Texas. And in that case, if recollection serves me, and it's failed me today at least once, but if recollection serves, the District Court ruling was made in December and the Fifth Circuit ruling was made in March. So that was a period of three to four months.

The other data point was it was not a Section 1782 case, but it was a discovery proceeding in New York, in the Southern District of New York, where I was attempting to obtain discovery from PriceWaterhouse U.K.

I bring it up because Mr. Legum was actually involved in that case in a different incarnation.

We obtained an order from the Southern District of New York, which is one of the courts with the most crowded dockets in the United States. It was appealed on an expedited basis to the Second Circuit, which also is a court with one of the most crowded dockets, and they responded very, very quickly, and my recollection is that we got a decision from the Second Circuit, again, within three or four months.

So my experience with District Courts and with Circuit Courts is that on matters of discovery, they are quite responsive and that, if presented to them properly, that this is a matter where the need for expedition is apparent, they will respond in a prompt manner.

So I believe that we could get this resolved quite quickly.

PRESIDENT VEEDER: If I can just interrupt to ask an obvious question. If this estimate were not to work, what would your position be about the main hearing? Should the main hearing go ahead, nonetheless, or should the main hearing go back or should the main hearing take place, but the evidence not be closed pending the receipt of further possible evidence?

MR. DUGAN: Well, we would like the opportunity to approach the Tribunal at that point, and I'm not sure that we're willing to take a position now and that it would depend on what we thought the prospects for success were and the amount of time that would be involved.

If it became apparent that we weren't going to be able to obtain discovery for years, then we might well take the position that it's not worth the candle, that it would be more appropriate to go forward to the Tribunal as soon as possible.

Now, finally, with respect to the accusation of gamesmanship, we have always taken the position with the Tribunal that we didn't believe that the Tribunal's blessing was necessary in order to invoke 1782. What we said in our October application, October 4th, at Footnote 1, we said that "Methanex seeks the Tribunal's assistance in obtaining the requested additional evidence, even though, under Section 1782, the appropriate District Court may issue an order to produce such evidence upon the application of any interested person.

Although Courts have held that it may not be necessary for a litigant to obtain the permission of the Tribunal before seeking an order in District Court," and at that point we cited the Malev case from the Second

Circuit, "Methanex wishes to avoid any dispute as to whether it was first required to obtain a Tribunal order."

In the best of all possible worlds, we would prefer a Tribunal order, but if the Tribunal, for whatever reason, is unwilling to issue it, we believe that under the statute we are entitled to go to the District Court as an interested party and seek to convince the District Court to grant us this additional evidence. In other words, while we would welcome a Tribunal order, we don't believe it is necessary for us to succeed at the District Court level, and I don't believe that position has changed.

Now, with respect to the ADM documents, I think I agree with Mr. Legum that there's no law on whether or not this Tribunal could obtain ADM documents. Certainly the way the Federal Arbitration Act reads, a Tribunal that is not sitting in Illinois cannot obtain evidence from persons who are resident in Illinois. Whether that geographic limitation in the statute would be obviated by the Tribunal's sitting in Illinois is something I simply don't know, but there's normally a geographic limitation with respect to a Tribunal's ability to ask a U.S. Court to obtain evidence.

MR. ROWLEY: May I just ask you whether that answer would--sorry, I don't mean to suggest that you've given an answer that is definitive or determinative, but the question of this Tribunal sitting in Illinois may enhance the ability to get ADM documents if that is a proposition worth discussing, is it also--would the situation be the same with respect to the Tribunal sitting in California, vis-a-vis California documents?

MR. DUGAN: Yes, as I understand it. I mean, the question is whether a Tribunal, an arbitral tribunal's power to petition a Federal Court for power to get documents travels with it or not, if it travels to Illinois--

MR. ROWLEY: The distinction I was making was not the location but the fact that the respondent to such a request might be a governmental entity.

MR. DUGAN: That I just don't know. In other words, even assuming that the geographic limitation could be gotten around by sitting physically in Illinois and California, your question is that even if that geographic limitation were gotten around, would a District Court have the ability to issue a subpoena to a government in California, a local government, as opposed to a private

corporation? I am sorry, I just don't know the answer to that.

MR. ROWLEY: Are you asking us to consider whether we should be sitting in Illinois, or Sacramento or Los Angeles to facilitate?

MR. DUGAN: No.

MR. ROWLEY: Not asking for that.

MR. DUGAN: No, no. I was just asking for permission to invoke 1782, which will get around that question completely.

MR. ROWLEY: Thank you.

MR. DUGAN: Then finally, just the last point, I think that with respect to the scope of the next phase of the proceeding, and the need to rely on circumstantial evidence, the Tribunal, in its decision in paragraph 149, I think has already crossed that bridge. I mean this was the statement of the Tribunal. Second, we accept that it is open to Methanex to rely on reasonable inferences, and it may rely generally on circumstantial materials. That's precisely what we hope to do here, is to--and that's precisely what we do do. We rely on the circumstances, all the circumstances surrounding this decision, the scientific record, the suitability of the measures for the purpose that it was supposed to serve,

the circumstances surrounding the political process, who triggered the political process, who was involved in it. To our mind, those are all obviously relevant circumstances for determining what California engaged in was a garden variety act of economic protectionism.

And I think that concludes my rebuttal remarks.

PROF. REISMAN: I would like to go back to the issue that you were enlightening me on earlier. After your answer you proceeded to the prohibition of methanol, explicit prohibition of methanol as an oxygenate. So in terms of 1101 or in terms of the partial award, there really are in this argument two types of actions that address the requirement of 1101 relating to. One of them is the explicit banning of methanol, qua methanol as an oxygenate, and the other is the inferential or consequential issue, and that is that MTBEs were harmed, and it was foreseeable that this would harm methanol producers. So you have introduced two arguments to address based on two separate behaviors to address 1101. Have I understood you correctly?

MR. DUGAN: You have, but I think that my only qualification would be that I think that the arguments that we've introduced as to the types of actions and the types of circumstances from which the Tribunal can infer

the requisite intent to satisfy the 1101 test go beyond those two points. In other words, our argument with respect to foreseeability goes to that point, that an intent to harm methanol producers and Methanex can be inferred from the foreseeability of the harm, that that's the type of circumstantial evidence from which the inference can be drawn.

PROF. REISMAN: Thank you. That is very helpful. Just to make sure that I understand, when you say intent can be inferred, we're not dealing with the intent that is manifested in the prohibition of methanol as an oxygenate. We're dealing with a type of constructive intent. In other words, we don't have to conclude in your conception that someone in the governmental apparatus of California intended harm, that we will in fact have a construction, a constructed intent that we will derive from the aggregate of the circumstances you direct us to.

MR. DUGAN: Well, I think it's both actually. I mean I think that in the nature of any active economic protection, that an intent to favor a local entity is an intent to disfavor its competitors.

PROF. REISMAN: I understand that point, but that's not my question. I don't mean to badger you, but

I just want to make sure I understand your point here with respect to 1101 since it is a critical part of the partial award.

Intent is required. Intent is certainly fulfilled with respect to banning methanol as an oxygenate, permitting a party to advance to 1102, 1105, 1110, whatever. Intent with respect to the prohibition of MTBE is not manifest in the same sense with respect to methanol producers. Here you say that that intent is to be inferred from the aggregate of circumstances. My question is: when one looks at the aggregate of circumstances and identifies foreseeability, does foreseeability equal intent or are you asking us to take foreseeability and to use that as a constructive intent? We no longer require a demonstration of intent. We will have a constructive intent because of the demonstration of foreseeability.

MR. DUGAN: I guess I'm not quite sure what you mean by constructed intent.

PROF. REISMAN: I mean in the first case we have an empirical demonstration of intent. No one can argue that methanol was prohibited as an oxygenate, and then one proceeds, one goes through the threshold, the screening process. With respect to the prohibition of

MTBE, we don't have that because the problem is, was this intended to harm methanol producers? As I understood you, you said one may infer such an intent by looking at foreseeability and foreseeability would be inferred from all the factors. Foreseeability cannot be effects because then we would be back to something rejected by the Tribunal in the partial award.

So if the Tribunal finds foreseeability and the aggregate of circumstances, it is entitled in your view to conclude that there was intent, but this will not be intent in the sense in which it was in the first with respect to the banning of methanol. This will be, as it were, constructive, or artificial, or inferred intent, if you like, virtual intent.

MR. DUGAN: It will certainly be inferred intent, and whether it would be virtual intent or constructive intent, I am a little less certain of. I guess what I go back to is regardless of how it's labeled, I think the law is clear, and it's clear as a matter of municipal law certainly, in those cases that deal with discrimination issues, that when harm is foreseeable, then the intent to harm can be inferred. Now, whether that's properly labeled as constructive intent or not, or whether that is a Tribunal making a

factual conclusion that there was indeed actual intent to harm, but they infer that on the basis of the foreseeability, is something I'm not in my own mind clear of, and I think it could be either really. It would depend on the facts and circumstances and the inferences that were drawn from them.

PRESIDENT VEEDER: I'll just ask you to go back to your proposed procedural schedule, page 14 of your response.

MR. DUGAN: Okay.

PRESIDENT VEEDER: Now, you heard the United States make the point that there's nowhere in this schedule any provisions for any full fresh pleading from the United States answering Methanex's fresh pleading. Would you accept that that has to be incorporated into this schedule?

MR. DUGAN: Yes, we would. We'd have no objection to the United States, in fact we would prefer it, if the United States would file a detailed pleading in response to all the particulars set forth in the second amended claim.

PRESIDENT VEEDER: If they were to do that, would you want to have a reply?

MR. DUGAN: No. I mean--

PRESIDENT VEEDER: You would forego it?

MR. DUGAN: We would forego it, and at that point we think that--I might point out that a reply is not required under the UNCITRAL rules. It is under ICSID rules, but it's not under the UNCITRAL rules. I think at that point the proceeding would be ripe for adjudication through witness statements and a hearing.

The reason why we believe that we can skip that process is that ultimately we believe this case is going to come down to that type of evidence, witness statements and cross-examination, and that having another round of factual pleadings that do not directly confront witness statements and the need for cross-examination is--it's not irrelevant, but on balance we think it's much less helpful than getting to a hearing on the merits as quickly as possible.

PRESIDENT VEEDER: You heard also their criticism of the 30-day time limit for the submission of their evidence-in-chief. This is leaving aside the quantum issue, but mirroring the exercise that you performed last year and this year as being too short. Do you dispute that?

MR. DUGAN: No, I don't dispute that. Actually, this was to a degree a mistake on our part. We had

thought to put in there 60 days rather than 30 days, and that's our fault. That's my mistake. We would only make the point that they've had the evidence with respect to our second amended claim since November. So they have had a long period of time to be able to respond to all that.

With respect to the evidence that was submitted on January 30th, if they wanted more time to respond to that, we'd be perfectly agreeable to more time to respond to that.

PRESIDENT VEEDER: Thank you very much.

The United States, would you like to respond?

MR. LEGUM: Could we take five minutes before we respond?

[Recess.]

PRESIDENT VEEDER: Mr. Clodfelter?

MR. CLODFELTER: Thank you, Mr. Chairman. What I'll do is begin with a couple of general comments, and then ask Mr. Legum to pick up as well.

I'd like to begin with this notion of a relationship between the concept of foreseeability and intent. First of all, just to remind us all about the context in which this issue arises, it arises in the context of when it can be reasonably said that a measure

relates to an investor or an investment. We do not believe that foreseeability is in any way relevant to this question, any important way relevant to the question.

I would like to begin by pointing out that this is the same argument that Methanex made before the Tribunal's partial award, that all they needed to show was foreseeability. The Tribunal has already rejected that, and for good reason. True, the universe of effects is huge, and the universe of foreseeable effects is somewhat smaller, and the universe of foreseen effects is even smaller. But even that smallest subset is itself gigantic of course, especially in the area of public policy. The economic effects of public policy measures are frequently studied and known and foreseen. It cannot be said, however, that every negative effect of a public policy measure is the motive behind that public policy measure. To do so eliminates all meaning to the term of intent. The entire limitation which the Tribunal upheld in its partial award is swallowed by this notion in that case, and is of no help to the Tribunal in deciding when these measures relate to a particular investor or investment.

It does not help to rely upon the concept of foreseeability in tort law. First of all, of course, that is a concept of liability; it is not a question of when a measure relates to any particular object. But most importantly, it ignores the fundamental distinction in tort law between intentional acts and negligent acts. If foreseeability were all that were necessary, all acts in tort would become intentional acts. Foreseeable, therefore intended, intentional acts. Of course, that's an absurdity. Foreseeability is not a sufficient basis on which to infer intent. It perhaps is a necessary element, but it falls far short of being sufficient to supply a basis for a reasonable inference.

What are the inferences that Methanex wishes you to draw from the circumstantial evidence they have presented that would justify combining the issue of merits on the question of liability with the jurisdictional question of whether these measures relate to Methanex? Well, it's very curious. Sometimes listening to Methanex's description of this case, one would think that the respondent is ADM and not the United States. Mr. Dugan once again this morning talks about ADM's concerted effort to manipulate the people process, and by doing so it has harmed foreign producers. Of

course, ADM's acts are not what are at issue in this case. It's the measures of the State of California. They have still not explained how, whatever motivation ADM may have had, relates in any way to the motivations of the State of California instituting these measures.

That underscores the fishing expedition nature of their request for additional opportunities to discover documents. I have to say I'm a little surprised. Certainly it's reasonable to expect that they would have exhausted all public avenues of this information. It's a very serious charge that they're making. Yet this morning we don't even know--it doesn't appear that they remember what efforts they have made to exhaust those public avenues. It doesn't sound so important, and that's what we hear from the other side.

Of course circumstantial evidence can be the basis for inferring intent. We never doubted that. The question is the particular evidence proffered. Here it is simply insufficient to infer anything about the intent of the State of California in promulgating these measures. I'll leave it there.

Mr. Legum?

MR. LEGUM: Mr. President, and Members of the Tribunal, I will try to be brief.

I'd like to begin by addressing Methanex's assertion that there is ample evidence already in the record to support a finding of intent. That is simply not the case. With respect to the issue of intent identified by the first partial award, there is, we submit, no evidence of any intent to harm Methanex or any methanol producer in the class to which it belongs. We've heard several references during the course of the day to what Senator Burton said. There is no evidence of any competent genre to support that. What we have is a statement by someone who says that unidentified persons told him that Senator Burton told them something on an unidentified date. This is hardly the kind of evidence that a Tribunal such as this can take into consideration in reaching a determination as serious as whether California intended to do something other than what it purported to do in its official acts and decrees, and we submit that if the Tribunal looks at the record that Methanex has put forward, it will find that there is not sufficient evidence of the type of intent that's identified in the award to support even a prima facie case of such intent.

Methanex refers to the evidence that we put in concerning the fuel cell partnership and asserts that

that proves their point precisely. Well, it proves our point precisely. That evidence is evidence of California's dealings with Methanex itself, not with MTBE producers, not with ethanol producers, nor even with methanol producers generally. It's evidence that relates to Methanex itself. That is the type of evidence that the Tribunal identified as being relevant to the issue of intent.

Turning to the subject of the discovery requests, we heard for the first time this morning that Methanex is not looking for evidence that is in the public record. That's something we had not heard at any point prior in these proceedings. And we also learned that Methanex has not yet decided what documents it wishes to pursue from either Dick Vind or Regent or ADM. Under these circumstances it is exceedingly difficult to arrive at any kind of decision as to whether the documents in question meet the requirements of the IBA rules, and are relevant and material to these proceedings. Based on Methanex's description of the documents that it seeks from Mr. Vind, it would appear that they are not relevant and material, as all of those documents go to promotion of ethanol and arguments

against MTBE, and not to the question of methanol or Methanex identified by the Tribunal.

In terms of the timing of the resolution of the proceedings, I also have not gone back and looked at the timing in either of the cases that Mr. Dugan referred to, either the Biedermann case or the Pricewaterhouse case. My own recollection of the Pricewaterhouse case is that the briefing schedule set by the Second Circuit, because there was an appeal and a cross-appeal in that case, itself took three months, which doesn't take into consideration the time that was required for either the notice of appeal to be filed, the District Court proceedings to come to fruition or for the Second Circuit to actually render its decision. My own recollection is that it took something on the order of a year or slightly less than a year, but again, I can't provide specifics there. I can say, however, that according to most recent statistics published by the Federal Courts, in the Ninth Circuit Court of Appeals it takes 15.1 months--that's the medium time for resolving an appeal from the filing of the notice of appeal through the issuance of the award.

And finally, I'd like to conclude by picking up on something that Mr. Clodfelter just said. Of course we don't dispute that the Tribunal may take into

consideration reasonable inferences from the evidence that has been offered, but the inferences that Methanex asked this Tribunal to draw simply are not reasonable. It cannot be reasonably inferred from a ban of one product that California intended to harm the suppliers of materials to the manufacturers of that banned product.

I'd like to conclude at this point, unless the Tribunal has any further questions, but I would note that there are points that the United States would like to make on the subject of the scope of amicus participation, which Ms. Menaker can address at any point when it's convenient for the Tribunal.

PRESIDENT VEEDER: We'll come to that in one moment. We'll just see if we have any questions from the Tribunal for you.

[Pause.]

PRESIDENT VEEDER: Mr. Legum, could we look at your proposed schedule, which was attached. It's page 2 of your letter of the 25th of March.

MR. LEGUM: I have it in front of me.

PRESIDENT VEEDER: Now, is it a deliberate omission that there's no full U.S. fresh pleading there on the basis that you don't need it if you go down this route?

MR. LEGUM: On the issue of intent, the supplemental statement of defense that the Tribunal has is our full fresh pleading with respect to that issue only.

PRESIDENT VEEDER: When we come to the oral hearing at the very end of this exercise, are you able to give any estimate or guesstimate as to the time required, or is it too early?

MR. LEGUM: Well, we estimate that it will require no more than three days.

PRESIDENT VEEDER: I beg your pardon. I forgot that, yes.

MR. LEGUM: That is also based on I guess a shared view that in these proceedings one can rely on witness statements as being essentially the direct examination, and only those witnesses need be called that the party or the Tribunal believes need to appear to testify.

PRESIDENT VEEDER: Thank you.

MR. ROWLEY: Mr. Legum, on intent to harm methanol, you say that it may not be inferred from an intent to harm MTBE. As I listened to Mr. Dugan, he says that there is an assertion of an intent to harm methanol in the pleading and evidence from which such intent can

be inferred. I was struck by one paragraph of the pleading in particular of the second amended claim at paragraph 121.

That paragraph deals with the California Air Resources Board, adoption the regulation that went into effect on 2nd September. And you'll see the last sentence of that paragraph asserts that, "Indeed, the expressly stated intent of the drafters was to ban, inter alia, all alcohols other than ethanol." I took that to be an intent to ban an alcohol which could or would include methanol.

Am I right in that or am I misunderstanding?

MR. LEGUM: Could I ask you to just repeat the very last clause of your question?

MR. ROWLEY: Yes. I won't get it right. It's my view that a gentleman never gets his quotes right, and I use that as my own provenance by misquoting. I never repeat my questions the same way, but I'll have a go.

In the last sentence of that paragraph, we see the statement, "Indeed, the expressly stated intent of the drafters was to ban, inter alia, all alcohols other than ethanol."

If it is correct that that was the stated intent, is that not an intent to ban methanol? Or am I misunderstanding?

MR. LEGUM: Well, several things. First of all, Methanex has never asserted that a ban of methanol violated the NAFTA. They have never asserted that the ban--that any ban of methanol is the basis for its claim in this case. And in our supplemental statement of defense, we questioned that and asserted a jurisdictional objection to the extent that they might be attempting to assert a claim based on a ban of oxygenates other than MTBE. And in their pleading of last week, their response was, no, we're not asserting a claim based on a ban of oxygenates other than MTBE; we're only pointing to that as evidence of intent in the ban of MTBE to address methanol producers. So that's one point that I hope is clear from the record at this stage because I think it's important.

MR. ROWLEY: I read what they said to--I understood it the same way you did. I hope we both understood it correctly. No doubt we'll be told if we didn't. But are they not saying that that is evidence of the requisite intent or evidence from which "a relation to" may be inferred?

MR. LEGUM: I believe that they are making that assertion, and we are prepared to address that. That's a factual question that we're fully prepared to address.

Very briefly, there were two points. First of all, what the regulation did was it essentially permitted only oxygenates that had passed a multi-media evaluation of their effects in the environment to be used as oxygenates. At the point in time when they did that--and I believe this continues to be the case--ethanol was the only oxygenate that had been so tested and had passed that test. But there is no reason why other oxygenates could not also be subjected to a similar test. There is nothing that prevents proponents of any other oxygenate from attempting to qualify them under that regulation, and to my understanding, there has been no attempt to qualify any other oxygenates under that conditional ban that you've just referred to.

The second point is that methanol is not used as an oxygenate and it cannot be used as an oxygenate in gasoline. And this is a point that we're prepared to address at some length in this phase limited to intent because it's important. It's important because it shows that evidence concerning ethanol, which can be used as an oxygenate, does not present evidence that's relevant

because ethanol and methanol are not competing oxygenates in the California market and they cannot be.

MR. ROWLEY: And if you're wrong on that point?

MR. LEGUM: If ethanol and--if methanol and MTBE are effectively the same thing, then I expect that we will not prevail in this phase on intent. But they are not the same thing, and they do not compete, and for that reason, I believe that we would prevail.

MR. CLODFELTER: If I might just add something to that, there's a reason why Methanex does not rely upon the ban on untested alcohols as a basis for their claim. They've never asserted that we're wrong on this point. First of all, if we're wrong, you asked, but they've never asserted otherwise. They've never asserted, nor can they, that methanol is used as a gasoline additive. It clearly is not.

Were it used as a gasoline additive and were it displaced by this regulation, that would have been the basis for their claim. They suffered no harm from that aspect of the regulation. That's why it's not the basis of the claim, and that's why they only rely upon it as so-called evidence of an improper intent with respect to the ban on the use of MTBE.

We submit that it is not evidence at all of such an impermissible intent. They haven't even explained how it's evidence of that intent and why, in fact, the ban on untested alcohols would even be necessary if that were the intent in banning MTBE.

So our position on that provision of the regulation is that it's not evidence of anything with respect to the intent in banning MTBE, nor have they demonstrated how it is.

MR. DUGAN: I guess just to start with, we quite clearly have said that the decision to ban methanol is persuasive and compelling evidence of California's intent to harm methanol producers. There's a reason why they banned methanol or why they went out of their way to evaluate it in a very cursory fashion during this process and to ban it without much thought, and that's because, in our view, they wanted to protect the market for ethanol.

Now, as to whether or not methanol is an oxygenate and used in gasoline, it is. Not in the United States but in Brazil it's used extensively, both as a gasoline additive and as an oxygenate. It's always been considered capable of being used as an oxygenate in the

United States. That's why it's mentioned so frequently. That's why EPA itself defines it as an oxygenate.

As a matter of fact, it's not used in the United States because it doesn't get the 54-cent-a-gallon federal tax subsidy that ethanol gets. Nor does it get the additional subsidies that various states give it. It can't compete economically with ethanol because it's not heavily subsidized and protected.

Technically, it can be used as an oxygenate. There's no doubt about that. And California went out of its way to make sure that there would be no possibility that methanol would compete with ethanol by banning it.

Now, secondly, as to why it was not considered thoroughly, only ethanol was considered thoroughly. Of all the--if we go back to what the UC-Davis study was supposed to do, it was supposed to look at all oxygenates and compare them and see which one was the most suitable. It didn't do that. It simply provided a pseudo-scientific basis for knocking MTBE out. It didn't do what it was supposed to do.

And, thereafter, California made it clear that there was one preferred oxygenate, and that was ethanol. And that was all it was going to consider. It wasn't going to consider methanol, and it was going to ban

methanol. And all of that points, in our mind, to the obvious conclusion. This is direct evidence that California intended to protect the market for ethanol, to create an in-State ethanol industry so that they could use their rice biomass to make ethanol, and at the same time to penalize all of ethanol's competitors, including methanol producers. And there could be no more cogent evidence than this explicit ban on methanol as an oxygenate.

PRESIDENT VEEDER: Let's move on now to amici.

MS. MENAKER: Mr. President, members of the Tribunal, as Mr. Dugan noted, the parties have been able to reach agreement on most aspects of amici participation in the next phase of the proceedings. The one aspect on which we disagree is the claimant Methanex would like to restrict amici participation to commenting on legal issues, whereby the United States feels that no such restriction should be imposed.

The Tribunal might recall that the initial applications filed by petitioners in the year 2000 requested permission to address both issues of law and issues of fact. In fact, in the joint submission made, the portion of that submission pertaining to IISD's proposed participation focused primarily on issues of

law, whereas the portion of the submission relating to Earthjustice's proposed participation focused almost exclusively on issues of fact. So we don't think it should come as any surprise that petitioners were seeking to participate on both legal and factual issues, and--

PRESIDENT VEEDER: Just to interrupt you, when you say "factual issues," I think we understood that it was really more expert fact than primary factual issues that they were raising. Is my recollection correct?

MS. MENAKER: If I understand your distinction, I believe it is. The factual issues that I recall having been brought up by Earthjustice's petition pertained to the scientific evidence for the ban and the chemical attributes of MTBE, water contamination, things of that nature, not factual issues such as what occurred during the August dinner, for instance.

And it was also--the United States' reading of this Tribunal's decision on amici participation also led us to conclude that this Tribunal anticipated that the amici would be permitted to comment on factual issues or did not foresee restricting the amici participation to legal issues. And specifically at paragraph 36 of its decision, the Tribunal indicated that it would retain discretion to decide what weight, if any, to attribute to

any amici submissions. It continued to state that, and I quote, "Even if any part of those submissions were arguably to constitute written evidence, the Tribunal would still retain a complete discretion under Article 25, subparagraph (6) of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality, and weight."

Now, if amici were limited to making legal argument, there would be no need to make a determination on the admissibility, relevance, materiality, or weight of any written evidence submitted by petitioners. And, thus, our reading of the Tribunal's decision is that it indicates that the Tribunal itself assumed that amici would not be restricted to commenting on legal issues.

Now, as Mr. Dugan noted, the United States did submit with one of its submissions on the amici issue the procedures that had been adopted by a WTO appellate body hearing the asbestos case. When we did so, however, we noted that the Tribunal might wish to consider adopting its own procedures for amici submissions that would be tailored to the specific needs of these proceedings. And the United States at no time proposed that the Tribunal adopt the guidelines adopted by the WTO appellate body wholesale. And doing so would be inappropriate.

The specific needs of this case warrant not restricting the content of amici submissions to legal issues.

Now, the guidelines that we attached that were adopted by the division hearing the appeal in the asbestos case were adopted for an appeal before the WTO appellate body. The rules governing appeals before the WTO appellate body provide that an appeal shall be limited to issues of law covered in a panel report and legal interpretations developed by the panel. It would, thus, make no sense to permit an amici to comment on factual issues in a WTO appellate case where the Tribunal is limited to addressing questions of law.

Now, although as far as we're aware no panel of the WTO has adopted formal guidelines like those adopted by the WTO panel in the asbestos case, panels in front of the WTO have, in fact, accepted amici participations, and those panels that have accepted amici participations have accepted submissions that have commented on factual as well as legal issues. And two such examples of WTO panels that have accepted such submissions are the panels that heard the softwood lumber disputes, which are at DS 236 and DS 257. And, of course, here in the next phase of the proceedings there will be both issues of law and

fact that will be decided, and we contend that it is thus appropriate for amici to be permitted to address both factual and legal issues.

I would also point out for the Tribunal that there's only been, to our knowledge, one other Chapter 11 case where the issue of amici participation has arisen. That has been the case brought by UPS against the Government of Canada. In that case, the Tribunal, like this one, found that it had authority to accept amicus petitions.

In that case, the claimant, like Methanex here, had argued that the existence of Article 1128 and Article 1133 evidenced that the Tribunal lacked authority to accept amicus submissions, and the Tribunal in that case, like this one, rejected that argument.

In rejecting the argument that Article 1133, which provides that the panel may appoint an expert witness, the Tribunal noted that an expert witness appointed by the Tribunal is unlike an amici. And when it made that distinction, it noted that an amicus might comment on specialized factual matters; however, an amicus' role may also be broader than that because an amici may comment on legal issues and may bring a distinct approach to several issues.

But it is our contention that the Tribunal also assumed that it would be appropriate for amici to comment on factual issues, and that discussion was in paragraph 62 of the Tribunal's decision, which we can provide for the Tribunal if that would be convenient.

Also, I would like to note that the Tribunal in its decision relied upon the jurisprudence of the Iran-U.S. Claims Tribunal and specifically the modified version of Article 15, Note 5, that governs the proceedings in front of that Tribunal, which permit the Tribunal to accept amicus submissions. And the Tribunal noted that in at least one instance, that Tribunal had accepted an amicus submission.

And in that case, which is Case A-15, the Tribunal accepted a Memorial from interested U.S. banks for filing in accordance with the UNCITRAL rule, and that Memorial itself addressed both factual and legal issues. In fact, the issue in dispute in that case was the balance of an account number, so the Memorial necessarily did address factual issues.

And, finally, I would just note that both U.S. and Canadian jurisprudence both support broad participation for amicus submissions, and there is no such restriction of limiting amici participation in U.S.

courts to commenting on legal issues, and to the best of my knowledge, no such restriction is imposed in Canadian courts either.

Thank you.

If it would be helpful, I could describe the rest of the actual agreement between the parties.

PRESIDENT VEEDER: That was our next question.

MS. MENAKER: I would just ask my colleague to pass around to members of the Tribunal the procedures that were adopted by the WTO appellate body in the asbestos appeal because that forms the majority of the agreed procedures between the parties, with a certain--one agreed-to modification and then one point of disagreement.

Essentially, what we would suggest is that the petitioners file application for leave to file their written submission along the lines contained in paragraph 3: that the application would be made in writing, dated and signed by the applicants, including the address and other contact details, be no longer than three pages, contain a description of the applicant, specify the nature of the interest the applicant has in the appeal, identify the specific issues that the applicant wishes to address, state why it would be desirable to achieve a

satisfactory result in this case to have the amici participation, and contain a statement disclosing whether the applicant has any relationship with any party to this dispute or will receive any assistance from any party to the dispute in preparation for its application or its written submission.

The petitioners have already made submissions that incorporate many of these things, but we think, you know, it might make sense to have one document in which all of this information is contained, and once this Tribunal issues an order describing what the next phase of these proceedings will look like, I think the amici, I would guess, would be better able to tailor their application to the specific submission that they wish to make at the next stage should they wish to make one.

The one modification as far as the first part of the procedure that the parties agreed to would be that we believe it would be more efficient for the amici to make--file their application for leave to make their written submission along with the written submission itself. That is more akin to what is done in U.S. practice, for instance, but doing that will enable the Tribunal to actually have the written submission in hand when it

evaluates whether to take into account the submission or not.

And then, of course, for the written submission itself, the parties have agreed essentially with what is set forth in paragraph 7: that it ought to be dated and signed by the person filing the submission, that the submission ought to be concise and in no case longer than 20 typed pages, including any appendices. And, of course, on that last paragraph is where our disagreement lies, which is subparagraph (c) of paragraph 7, which is whether their statements should be limited to commenting on legal issues as opposed to factual issues.

PRESIDENT VEEDER: [Inaudible comment off microphone.]

MS. MENAKER: That's correct. There are a number of places where it would have to be modified for, you know, this particular case.

MR. DUGAN: On the amici, if I just might respond, I agree with Ms. Menaker that with respect to those issues that we have agreed upon, it is as was set forth there. With respect to the factual issues, I'd like to make two broad points.

First of all, as you can see from the participants in the room itself, Methanex is up against

the full weight of the United States Government. You have participants from State Department, the USTR, Treasury, EPA and Commerce, as well as representatives from the State of California. Canada and Mexico are not here. They've already expressed their opposition to this case in forceful terms. We'll have to respond to their submissions.

As a matter of just equity, to require us to respond to the factual submissions of a host of environmental organizations is a classic example of unduly burdensome procedural requirements. It is just simply not something that a single claimant should have imposed upon it.

Secondly, we have not had time to research the history of when factual submissions are allowed, and we'd like to be able to do that if the Tribunal is seriously considering that. Ms. Menaker just gave a lucid description of the cases that she believes supports the United States. We'd like to have the time and the opportunity to do that with respect to other cases.

But I might point out that this is--the factual nature of this case is extraordinarily complex and broad. There may be certain cases where commentary on factual matters would be useful. But in a case that's as

sprawling and as wide as this, Methanex submits that allowing a host of organizations, which will be predominantly environmental organizations, to comment and to put new facts into the record is simply--it's a metastasis of the process, and it's simply not called for here.

PRESIDENT VEEDER: Well, thank you for that.

It's now 1 o'clock. Unless there's something usefully that could be raised, we propose to break now and to resume this afternoon when we'll have a chance to address the first part of your submissions this morning. We'll come back to amici and other minor matters at the end.

We suggest we start again--at 2:45, do you think?

What we suggest is that we come back here at 2:45. That will give us time, I think, to deliberate. It will give you time to have lunch. If that's convenient with you, that's what we'll do. So back here at 2:45. Thank you.

[Whereupon, at 12:59 p.m., the meeting recessed, to reconvene at 2:45 p.m., this same day.]

AFTERNOON SESSION

[3:03 p.m.]

PRESIDENT VEEDER: Well, I apologize for keeping you all waiting.

We've done our best to deliberate and to arrive at certain decisions. Unfortunately, on the main decision, which we had hoped to discuss with you at this stage, we do need more time. It's a credit to both sides that you make such submissions which cause such difficulty that they are causing us difficulty, and it's an important matter on which we've decided not to truncate our discussions but to release you, and we'll be writing to you in due course, not this week but I hope by the end of next week. So I'll say no more about the main issue which divides you as regards the future procedure of this arbitration.

As regards Article 1782, again, we're going to deliberate a little bit more about this, and we'll have a paragraph about that in our letter, I hope at the end of next week.

We are not minded at the moment to give the blessing requested by Methanex for its proposed application to the U.S. district courts for reasons which we'll elaborate. We don't consider that such an

application at this particular stage of the proceedings is timely.

As regards the amici, we congratulate the parties on reaching such near agreement, but on the critical point at issue, we understand Methanex would like more time to address this distinction between a legal amici and a fact amici. And given that we certainly have time to accommodate that request, we propose to give Methanex the time requested to put in its point of view by way of further written submissions. We don't propose to convoke a fresh hearing about that, and obviously there would be a response if the USA wished to make it in response to what Methanex had said to us.

We need to discuss a little bit about the timetable for that, but I suspect it's not a very time-consuming exercise. Could you do that by the end of next week or even earlier?

MR. DUGAN: Yes, we can do it by the end of next week.

PRESIDENT VEEDER: I think depending on the volumes accompanying, we can see what the response would be from the United States, but if you can assume you have ten days thereafter and work on that basis, unless

there's some particular difficulty which we can't foresee.

That concludes the response that the Tribunal indicated it would give to the parties, and I'm sorry we can't give you more. So I thank you again for waiting, but it's been a very helpful meeting for us. And as I say, we'll put something in writing for you I hope by the end of next week, which will take this arbitration further.

Is there anything on the Methanex side you wanted to raise at this stage?

MR. DUGAN: No, not at this time.

PRESIDENT VEEDER: And on the USA side?

MR. LEGUM: Not at this stage.

PRESIDENT VEEDER: Well, that's all that we have to say, so we close the meeting at 5 past 3:00. Thank you.

[Whereupon, at 3:05 p.m., the meeting was adjourned.]