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

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

POST-HEARING SUBMISSION OF RESPONDENT UNITED STATES OF AMERICA

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

July 20, 2001

CONTENTS

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

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

POST-HEARING SUBMISSION OF RESPONDENT UNITED STATES OF AMERICA

In accordance with the Tribunal's order at the close of the hearing on jurisdiction, admissibility and the proposed amendment on July 13, 2001, the United States respectfully submits this post-hearing submission on the applicability of Article 31(3)(a) of the Vienna Convention on the Law of Treaties and the decision of the International Court of Justice on preliminary objections in *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803 (Dec. 12).

I. THE NAFTA PARTIES' SUBMISSIONS EVIDENCE SUBSEQUENT AGREEMENT REGARDING THE INTERPRETATION OF THE NAFTA

As the United States demonstrated at the hearing, the submissions of the NAFTA Parties filed with this Tribunal establish "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" within the

meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties. *See* Hearing Transcript at 232-36, 507-10.

All three NAFTA Parties have clearly indicated that they are in agreement regarding the proper interpretation of Article 1105(1) and one aspect of Article 1101(1). The United States in both its written and oral submissions in this arbitration has noted the "agreement among the NAFTA Parties" on Article 1105(1) that "the treatment required by the Article is that of the international minimum standard of customary international law," U.S. Reply at 23-24, and that "[t]he plain language and structure of Article 1105(1) requires [that 'fair and equitable treatment' and 'full protection and security'] be applied as and to the extent that they are recognized in customary international law, and *not* as obligations to be applied without reference to international custom." U.S. Memorial at 39.[1] It further has noted that "all three NAFTA Parties have observed [that] the term 'relating to' in Article 1101(1) may not properly be interpreted to mean merely 'affecting.'" U.S. Rejoinder at 46. In their written submissions made pursuant to Article 1128, the Governments of Canada[2] and Mexico[3] express explicit agreement with these

[1] *See also* Methanex Rejoinder at 42 (acknowledging that the United States' "litigating position in this case" is "now joined by Canada and Mexico").

[2] *See* Canada's Second 1128 Submission ¶ 26 ("Canada *agrees* with the disputing parties that NAFTA Article 1105 incorporates the international minimum standard of treatment recognized by customary international law") (emphasis supplied); *id.* ("it is a matter of public record that *the three NAFTA Parties are in agreement* on this interpretation") (emphasis supplied); *id.* at ¶ 37 ("*The three NAFTA Parties agree* that 'fair and equitable treatment' is explicitly subsumed under the minimum standard of treatment at customary international law") (emphasis supplied); *id.* ¶ 41 ("*Canada agrees with the United States* that the Investor's suggestion would broaden the requirement to provide full protection and security to foreign investors beyond that which is contemplated by the international minimum standard of treatment recognized by customary international law") (emphasis supplied); *see also id.* ¶¶ 22-23 ("The NAFTA Parties clearly did not intend that every regulatory measure of general application which merely affects or has an incidental, minimal, or inadvertent effect on an investor, or its investments, would give rise to a claim under NAFTA Chapter Eleven. Furthermore, *Canada agrees with the United States* that the term 'relating to' requires a 'significant connection[']' between the measure at issue and the essential nature of investment.") (emphasis supplied).

statements made by the United States concerning the interpretation of the NAFTA. In accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties, this agreement among the parties to a treaty "shall be taken" into account.

This conclusion finds ample support in the text of the Convention, its *travaux préparatoires* and the writings of commentators. Article 31(3)(a) operates whenever there is agreement between the parties regarding the interpretation of a treaty. It applies if there is "*any*" agreement between the parties. The provision does not require a formal instrument of agreement. In contrast to paragraph 1 of Article 31, Article 31(3)(a) of the Convention does not use the term "treaty," as defined in Article 2(1)(a), nor even the term "international agreement" to describe the agreement that must be taken into account. Unlike Articles 31(2)(a) and (b), Article 31(3)(a) is not limited to an agreement "which was made." *See* VCLT art. 31(2)(a) ("[a]ny agreement relating to the treaty which was made between all the parties . . . "); art. 31(2)(b) ("any instrument which was made by one or more parties . . . "). The absence of the phrase "which was made" in Article 31(3)(a) further supports the conclusion that Article 31(3)(a) applies to any condition in which the parties are in a state of agreement, as may be evidenced by concordant statements of position. This reading of the provision is consistent with the context in which the word "agreement" appears: "agreement" under Article 31 cannot *create* a treaty right or obligation, it can only interpret an existing treaty provision.

---

[3] Mexico's May 15, 2001 Article 1128 Submission ¶ 9 ("*Mexico concurs with the United States* that Article 1105 establishes only an international minimum standard of customary international law in which 'fair and equitable treatment' is subsumed") (emphasis supplied); *id.* ¶ 14 ("*Mexico also concurs with, and adopts, the submissions of the United States* at pages 30-33") (emphasis supplied); *id.* ¶ 17 ("*Mexico agrees with the United States* on this fundamental point") (emphasis supplied); *see also id.* ¶ 7 ("*Mexico agrees with the position of the United States*, and disagrees with Methanex's contention that measures that merely 'affect' investors or investments are covered by Chapter Eleven.") (emphasis supplied).

This reading of Article 31 is also consistent with the preparatory work of the Convention, which recognizes that "agreement" within the Article need not be in any particular form.[4] The views of respected commentators on the Convention further support this reading.[5] For example, Mustafa Yasseen, chairman of the drafting committee for the conference that adopted the Convention,[6] later wrote:

> It is above all not necessary that an interpretive agreement be clothed with the same form as that of the treaty it concerns, however solemn and important this treaty may be. The interpretive agreement may be in simplified form, may be realized by an exchange of notes or even by concordant oral declarations.[7]

Methanex's arguments at the hearing to the contrary are without merit. *First*, Methanex's contention that any agreement on interpretation can have only prospective effect is wrong. Hearing Tr. at 412-13. Contrary to Methanex's suggestion, the general rule is that interpretations of a treaty provision – whether by the treaty parties or by an

---

[4] United Nations Conference on the Law of Treaties, 2d Sess., Vienna, 9 Apr.-22 May 1969, Official Records 57 ¶ 65 (May 6, 1969) (in only statement made before Article 31 was adopted by Conference in final form, the FRG delegate stated that "his delegation was of the opinion that subsequent agreements between the parties regarding the interpretation of a treaty, as mentioned in paragraph 3, did not have to be in written form. It was confirmed in that opinion not only by constant State practice but also by the fact that paragraph 3 treated subsequent agreements and subsequent practice on an equal footing.").

[5] *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 191-93 (2000) (collecting examples of State practice in which agreements concerning interpretation were informally adopted by decisions of parties); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 254 § 165 (6th ed. 1999) ("interpretative instruments adopted *after* the treaty[,] [o]ften, take the form of accords in simplified form concluded according to an abbreviated procedure, even if the treaty in question was clothed in a solemn form. . . . . It is accepted that such a subsequent agreement can be *tacit* and result from concordant practices of States when they apply the treaty.") (translation by counsel; emphasis in original) ("les instruments interprétatifs adoptées *postérieurement* au traité[,] [s]ouvent, ils prendront la forme d'accords en forme simplifiée conclus selon la procédure courte, même si le traité de base a revêtu la forme solennelle. . . . . Il est admis que cet accord postérieur peut être *tacite* et résulter des pratiques concordantes des Etats quand ils appliquent le traité.").

[6] *See* United Nations Conference on the Law of Treaties, Official Records xxiii (1969).

[7] Mustafa Yasseen, *L'interprétation des traités d'après la Convention de Vienne*, 151 R.C.A.D.I. 1, 45 (1976) (translation by counsel) ("Il n'est surtout pas nécessaire qu'un accord interprétatif revête la même forme que celle du traité qu'il concerne, si solennel et si important que soit ce traité. L'accord interprétatif peut être en forme simplifiée, peut se réaliser par un échange de notes ou même par des déclarations orales concordantes.") (footnotes omitted).

international tribunal – are retroactive in effect, since an interpretation does not change the content of a provision, it merely clarifies what the provision always meant.[8]

Second, Methanex asserts that the NAFTA grants the Free Trade Commission exclusive authority to "resolve disputes that may arise regarding its interpretation or application." NAFTA art. 2001(2)(c); *see* Hearing Tr. at 413-15 (citing art. 2001(2)(c)). Nothing, however, in the text of Chapter Twenty of the NAFTA suggests that the Free Trade Commission's authority in this regard excludes other means by which the Parties may interpret the Agreement. Nor is there any indication in Article 1131 or elsewhere in the NAFTA that the Parties intended to override the customary international law rule, as reflected in Article 31(3)(a) of the Vienna Convention on the Law of Treaties, that agreement among the parties to a treaty shall be taken into account. To the contrary, the NAFTA recognizes that interpretation of the Agreement may take various forms. In addition to an interpretation of the Free Trade Commission made under Article 1131(2), Article 1128, of course, gives any NAFTA Party the right to make a submission to a tribunal on a question of interpretation of the Agreement. Like Article 1128, Article 2013 provides that a NAFTA Party that is not a disputing Party may make submissions to a panel established under Chapter Twenty to settle disputes. In addition, Article 1415 provides for a mechanism whereby the Financial Services Committee, comprised of members of each of the Parties, may decide an issue when an investor files a claim under

[8] *See id.* at 47 ("The rule is that the interpretation is embodied in the text interpreted; the effect of a subsequent agreement thus goes back to the day of the entry into force of the original treaty.") ("Il est de règle que l'interprétation fasse corps avec le texte interprété ; l'effet d'un accord interprétatif remonte donc au jour de l'entrée en vigeur du traité initial."); *see, e.g., LaGrand (Germ. v. U.S.)*, 2001 I.C.J. __ ¶¶ 99, 109-116 (June 27) (resolving question of interpretation of article of ICJ and PCIJ Statutes that had been subject of decades of controversy in literature and applying interpretation adopted to acts at issue before Court).

Chapter Eleven and the NAFTA Party invokes Article 1410. Finally, Article 2020 provides that where an issue of interpretation of the Agreement arises in any domestic proceeding of a Party that any Party considers would merit its intervention, that Party shall notify the other Parties and the Free Trade Commission shall endeavor to agree on an appropriate response concerning that issue of interpretation. It is thus apparent that Article 1131 does not provide the sole or exclusive basis for the Parties to reach agreement on interpretations of the Agreement.

Finally, Methanex's contention that amendments to the NAFTA must first be subjected to municipal "political processes" is misplaced. Hearing Tr. at 415-17. The NAFTA Parties' reading of the relevant provisions of the NAFTA are interpretations, and not "amendments" as Methanex contends. Methanex is incorrect in suggesting that the United States cannot interpret these provisions without subjecting its interpretations to municipal "political processes."[9]

For the reasons set forth here and in the United States' oral submissions, the written and oral submissions of all of the NAFTA Parties evidence agreement on issues of interpretation of Articles 1101(1) and 1105(1) of the NAFTA. Pursuant to Article 31(3)(a) of the Vienna Convention, these agreements should be taken into account by this Tribunal.

[9] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(1) (1987) ("The President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states.").

II. THE *OIL PLATFORMS* DECISION SUPPORTS PRELIMINARY DISMISSAL OF METHANEX'S CLAIMS

A. The Disputing Parties' Standard For Jurisdiction And Admissibility

The disputing parties here concur as to the standard for reviewing Methanex's claims for purposes of determining jurisdiction and admissibility. As noted in Methanex's Counter-Memorial and the United States' Reply, a claimant must "*credibly allege* the factual elements of a claim" under Chapter Eleven for the claim to be arbitrable. Methanex Counter-Memorial at 2 (emphasis added); U.S. Reply at 5. The requirement to "credibly allege" the factual basis for a claim requires dismissal, if, even assuming them to be true, a claimant's factual allegations cannot as a matter of law establish a prerequisite to jurisdiction or admissibility under the terms of Chapter Eleven as properly interpreted.

Thus, Methanex's claims under Article 1102 require dismissal since, even assuming Methanex's allegations to be true, Methanex cannot, as a matter of law, be deemed to be "in like circumstances" with U.S.-owned ethanol producers, within the meaning of Article 1102 as properly interpreted, because there is a substantial U.S.-owned methanol industry with which it *is* in like circumstances, and which is treated by the California measures in exactly the same way as Methanex. Similarly, Methanex's claims under Article 1105(1) must be dismissed even assuming the truth of its factual allegations because, as a matter of law, Methanex has failed to identify any international standard of treatment incorporated in Article 1105(1), as properly interpreted, that it alleges to be implicated by the California measures. Again making the same factual assumptions, Methanex's claims under Article 1110 must be dismissed because, as a

legal matter, it has failed to identify any "investment" capable of being "nationalized or expropriated" within the meaning of Articles 1110 and 1139, as properly interpreted.

Under this same analysis, none of Methanex's claims meet the Article 1101 jurisdictional requirement that the measures at issue "relate to" it and its investments. Even assuming all of Methanex's allegations to be true, there is no connection between the California measures and suppliers of ingredients for MTBE that, as a matter of law, is legally significant. Similarly, none of Methanex's claims meet the jurisdictional requirement of Articles 1116 and 1117 that Methanex has suffered losses "by reason of, or arising out of," a breach of Chapter Eleven. Under the facts as alleged, none of Methanex's alleged losses could, as a matter of law, be considered as having been "proximately caused" by the California measures. Moreover, as a matter of law, no claim under Articles 1102 or 1110 can be recognized where, as here, the ban that is alleged to violate national treatment and constitute an expropriation is not yet in effect. Nor has Methanex made any credible allegation to support its averment of "loss or damage" resulting from a future ban. Finally, there is no jurisdiction over Methanex's Article 1116(1) claim for injuries that are either derivative of those supposedly suffered by an enterprise or do not derive from Methanex's capacity as an investor in the United States.

None of these conclusions is changed by Methanex's assertion that the measures were intended to injure Methanex or foreign-owned methanol producers and marketers and/or to benefit the U.S.-owned ethanol industry. This assertion of intent calls for a factual finding based on the allegations. However, even assuming their truth, the alleged facts are, as a matter of law, insufficient to permit the inference of intent as asserted.

Thus, with respect to all of the claims, and each of them individually, Methanex has failed credibly to allege the factual elements of a claim that can be considered as within the Tribunal's jurisdiction, or as admissible, as the case may be.

B. The *Oil Platforms* Methodology for Deciding ICJ Jurisdiction

In *Oil Platforms* (Iran v. U.S.), 1996 I.C.J. 803 (Dec. 12), the International Court of Justice addressed preliminary objections to the Court's jurisdiction that, under the relevant compromissory clause, involved determining whether a dispute regarding the interpretation or application of a treaty existed. In doing so, the I.C.J. analyzed the treaty's substantive provisions to determine the parameters of the obligations imposed and applied the facts alleged by the applicant to each of those provisions to test whether a genuine dispute was present requiring resolution in a merits phase. In a separate opinion, Judge Higgins explained the methodology for the Court's approach. In another separate opinion, Judge Shahabuddeen explained why he believed the Court's approach went too far in considering the merits at a preliminary phase.

The *Oil Platforms* approach – testing the facts alleged against the substantive treaty provisions implicated to determine whether the claim falls within the compromissory clause – is consistent with the positions of Methanex and the United States regarding the standard this Tribunal should apply in resolving the United States' preliminary objections on jurisdictional and admissibility grounds in this NAFTA Chapter Eleven arbitration brought under the UNCITRAL Arbitration Rules. Therefore, the *Oil Platforms* case supports the dismissal of Methanex's claims at this preliminary phase.

1. The Court's Decision

In *Oil Platforms*, the I.C.J., in a preliminary phase, determined that jurisdiction did not attach with regard to certain claims that the United States' actions in attacking and destroying Iranian oil platforms violated the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran ("1955 Treaty"), Aug. 15, 1955, 8 U.S.T. 900. The 1955 Treaty's compromissory clause provides that "'*[a]ny dispute* between the High Contracting Parties *as to the interpretation or application* of the present Treaty, not satisfactorily adjudicated by diplomacy, shall be submitted to the International Court of Justice . . . .'" *Id.* at 809 ¶ 15 (quoting 1955 Treaty, art. XXI(2)(d) (emphasis added)). The Court held that jurisdiction existed under the 1955 Treaty's compromissory clause to hear Iran's claim that the United States violated Article X(1) of the 1955 Treaty. However, the Court dismissed, on jurisdictional grounds, Iran's claims that the United States violated Articles I and IV(1) of the 1955 Treaty.[10]

In determining jurisdiction, the Court noted that "the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application' of the Treaty of 1955." *Id.* at 810 ¶ 16. The Court held that, "to answer that question, the Court cannot limit itself to noting that one of the Parties

---

[10] Article I of the 1955 Treaty provides that "'[t]here shall be firm and enduring peace and sincere friendship'" between the United States and Iran. *Id.* at 812 ¶ 24 (quoting 1955 Treaty, art. I). Article IV(1) of the 1955 Treaty provides that "'[e]ach High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure their lawful contractual rights are afforded effective means of enforcement, in conformity with applicable laws.'" *Id.* at 815 ¶ 32 (quoting 1955 Treaty, art. IV(1)). Article X(1) of the 1955 Treaty provides that "'[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.'" *Id.* at 817 ¶ 37 (quoting 1955 Treaty, art. X(1)).

maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2." *Id.*

As acknowledged by Judge Shahabuddeen, "what th[is] statement means is that the Court is required to make a definitive interpretation of the Treaty at this jurisdictional phase." *Id.* at 823. Moreover, as reflected by the *Oil Platforms* decision and in the separate opinion of Judge Higgins, this statement also means that at the preliminary phase the Court must apply the facts as pleaded to its interpretation of the treaty provision at issue to determine whether the actions complained of might violate that provision and therefore that jurisdiction exists. *Id.* at 856 ¶ 33.

Based on its interpretation of the 1955 Treaty and its application of this standard, the Court found there to be no "dispute as to the interpretation or application" of the Treaty with respect to the alleged breach of the articles mandating "firm and enduring peace" and "fair and equitable treatment." *See id.* at 815 ¶ 31; *id.* at 816 ¶ 36. It therefore concluded it had no jurisdiction with respect to those claims.

By contrast, the Court concluded that the factual allegations did present it with a "dispute as to the interpretation and the application" of Article X(1) of the 1955 Treaty, addressing "freedom of commerce." *See id.* at 820 ¶ 53. The Court explained that "[o]n the material now before the Court, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms has an effect upon the export trade in Iranian oil; it notes nonetheless that their destruction was capable of having such an effect and,

consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955." *Id.* at 820 ¶ 51.

2. Judge Higgins' Separate Opinion

In Judge Higgins' separate opinion, she explained "the methodology for determining whether a particular claim falls within the compromissory clause of a specific treaty." *Id.* at 848 ¶ 2. In particular, Judge Higgins explained why, in determining in a preliminary phase the validity of a jurisdictional objection, "[t]he Court should . . . see if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles." *Id.* at 856 ¶ 33.

In reaching this conclusion, Judge Higgins noted that I.C.J. and Permanent Court of International Justice cases "reveal a struggle between the idea that it is enough for the Court to find provisionally that the case for jurisdiction has been made, and the alternative view that the Court must have grounds sufficient to determine definitively at the jurisdictional phase that it has jurisdiction." *Id.* at 849 ¶ 9. The former line of cases is represented by *Ambatielos* (Greece v. U.K.), 1953 I.C.J. 10 (May 19), in which the I.C.J. held that, while "'[i]t is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty,'" a preliminary objection to the Court's jurisdiction could be defeated based on the existence of a "'possible interpretation'" of the treaty or "'sufficiently plausible'" arguments "to warrant a conclusion that the claim is based on the Treaty." *Id.* at 851 ¶ 16 (quoting *Ambatielos*, 1953 I.C.J. at 18). The latter line of cases is represented by *Mavrommatis Palestine Concessions* 1924 P.C.I.J. (ser. A) No. 2, in which the P.C.I.J. held that it "'cannot content itself with the provisional conclusion that the dispute falls or not within the terms

of the Mandate.'" *Id.* at 849 ¶ 11 (quoting *Mavrommatis*, 1924 P.CI.J (ser. A) No. 2, at 16).

Judge Higgins explained that the *Mavrommatis* line of cases identifies the correct approach to resolving jurisdictional disputes. *Id.* at 849-57 ¶¶ 11-36. Noting that *Mavrommatis* "remains of seminal importance" and represents "[t]he correct way to approach these difficult matters," *id.* at * 850 ¶ 14, she explained that "[t]he technique employed by the Permanent Court was to enter into a very substantive and detailed analysis of the claims . . . . The analysis was anything but 'provisional.' Nor was there any suggestion that the Permanent Court thought its task was to see if Greece had made 'plausible arguments' or suggested a 'reasonable link' between the claims and those provisions." *Id.* at 849 ¶ 11 (quoting *Mavrommatis*, 1924 P.C.I.J. at 23). Stating that "[t]he *Mavrommatis* model remains the more compelling," Judge Higgins also distinguished *Ambatielos* – a case where the Court was asked to decide whether the parties were obligated to submit a dispute to an arbitral tribunal – on the ground that "in the present case there is no question of the merits of the case being decided by any tribunal other the Court itself." *Id.* at 851 ¶ 18; *see also id.* ¶ 17, 856 ¶ 33.

In explaining the Court's adherence to the *Mavrommatis* approach in *Oil Platforms*, Judge Higgins rejected a number of possible formulations of the test for determining jurisdiction at a preliminary phase. *Id.* at 855-56 ¶¶ 29-32. For example, she expressly rejected the view that jurisdiction could be based "on an impressionistic basis," *id.* at 855 ¶ 29, and explained: "It does not suffice . . . for the Court to decide that it has heard claims relating to the various articles that are 'arguable questions' or that are 'bona fide questions of interpretation' . . . . Nor . . . is the answer to be found in the

establishment of a 'reasonable connection' between the claims and the Treaty – that is a necessary but not sufficient condition." *Id.* at 855-56 ¶ 31.

Judge Higgins explained that the existence of jurisdictional elements in dispute must be "definitive[ly]" decided when jurisdictional objections are made: "The Court has first to decide if the claims fall under the 1955 Treaty – in other words, that the Treaty applies." *Id.* at 855 ¶¶ 30-31. To make this determination, the Court must "interpret[] the articles which are said . . . to have been violated" by "bring[ing] a detailed analysis to bear." *Id.* ¶ 29. As part of this analysis, the Court must determine whether, on the basis of the alleged facts, the actions complained of might violate the treaty. *Id.* at 856 ¶ 33. She explained:

> the only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and [in] that light to interpret Articles I, IV and X for jurisdictional purposes – that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.

Id. ¶ 32.

Judge Higgins noted that this approach to jurisdiction does not "put[] at risk . . . the integrity of the proceedings on the merits." *Id.* ¶ 34. She explained:

> Of course any definitive decision that even on the facts as described by Iran no breach of a particular article could follow, does "affect the merits" in the sense that the matter no longer may go to the merits. That is inherent in the nature of the preliminary jurisdiction of the Court. What is for the merits – and which remains pristine and untouched by this approach to the jurisdictional issue – is to determine what exactly the facts are, whether as finally determined they do sustain a violation of, for example, Article X; and if so, whether there is a defense to that violation, laying in Article XX or elsewhere. In short, it is as to the merits that one sees "whether there really has been a breach."

Id. (quoting *Mavrommatis*, 1924, P.C.I.J. (ser. A) No. 2, at 23).

Finally, in determining that jurisdictional issues should be definitely addressed at a preliminary phase, Judge Higgins noted that "it is to be borne in mind that: 'Neither the Statute nor the Rules of the Court contain any rule regarding the procedure to be followed in the event of an objection being taken in *limine litis* to the Court's jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.'" *Id.* at 854 ¶ 28 (quoting *Mavrommatis*, 1924 P.I.C.J. (ser. A) No. 2, at 16). She further noted that "there is no evidence that the various exercises of jurisdiction by the two Courts [I.C.J. and P.C.I.J.] really indicate a jurisdictional presumption in favour of plaintiff." *Id.* at 857 ¶ 35.

3. Judge Shahabuddeen's Separate Opinion

Judge Shahabuddeen, implicitly rejecting Judge Higgins' and the majority's analysis, argued that the *Oil Platforms* majority should have adopted a significantly more restrictive approach to jurisdictional objections raised at a preliminary phase. Noting that in *Oil Platforms* the I.C.J. adopted the view that "it was required at the jurisdictional stage to determine definitively whether the provisions relied on by the applicant applied, on their true construction, to the alleged circumstances," Judge Shahabuddeen stated: "That view . . . differs materially from the more limited view that the duty of the Court at this stage is merely to decide whether the construction of the treaty on which the applicant relies for saying that the treaty applies to the alleged circumstances is an arguable one . . . ." *Id.* at 829; *see also id.* at 840-41.

Judge Shahabuddeen agreed that "the Court must be clearly satisfied that it has jurisdiction." *Id.* at 823. Also, he agreed that "the Court cannot altogether avoid some interpretation of the treaty." *Id.* at 828. Nonetheless, relying on certain I.C.J. cases – cases that Judge Higgins found distinguishable – in which the Court "refrained from making a definitive interpretation of the relevant texts," Judge Shahabuddeen stated:

> the Court can only interpret the treaty at the jurisdictional stage in so far as it is necessary to do so for the purpose of determining whether the applicant's interpretation of the treaty is an arguable one, and not for the purpose of determining definitively whether the treaty applies to the alleged circumstances. The more limited function is undertaken by the Court in exercise of its *compétence de la compétence*; the more definitive function is undertaken in exercise of its substantive jurisdiction. In exercise of its *compétence de la compétence*, the Court could well hold that the applicant has an arguable contention that the treaty applies to the alleged circumstances even if, in the exercise of the substantive jurisdiction which flows from that holding, it eventually holds that the treaty does not. In effect, the treaty may not apply to the alleged circumstances and yet the Court may have substantive jurisdiction to determine precisely whether it does.

Id. at 828.

In explaining his opinion that the *Oil Platforms* majority applied the wrong approach to deciding jurisdiction, Judge Shahabuddeen emphasized the breadth of the compromissory clause of the 1955 Treaty. *Id.* at 823. He noted that because jurisdiction depended on the existence of a dispute regarding the interpretation or application of the treaty, "[t]here could be a dispute as to whether there is a dispute as to the interpretation or application of the treaty. To decide on the correctness of the applicant's interpretation is to decide the second dispute, not the first; and that is to determine part of the substance of the claim before the merits stage has been reached." *Id.* at 829. He then noted that

whether an alleged obligation exists is a merits question because it requires a definitive interpretation of the treaty and general international law. *Id.*

Judge Shahabuddeen provided three reasons why, in his opinion, merits questions cannot be resolved at the jurisdictional phase. First, the preliminary phase is "a time when, according to Article 79, paragraph 3 [sic], of the Rules of the Court, the merits stood suspended." *Id.* Second, the I.C.J. "lacks a filter mechanism through which . . . . it is possible to argue, ahead of the normal merits phase, that, taking the facts alleged . . . at their highest, they do not justify the claim for the reason that the asserted obligation does not exist in law, or that, if it exists, it is not breached by the alleged facts. The practice of thus 'striking out' an application has not yet developed in proceedings before this Court." *Id.* at 830. Third, deciding the merits in the preliminary phase would violate "the fundamental principle that a preliminary decision cannot decide, or even prejudge, issues belonging to the merits." *Id.* at 830.

Finally, Judge Shahabuddeen explained when, in his opinion, the Court may properly determine in a preliminary phase on jurisdictional objections that a "'dispute . . . as to the interpretation or application'" of a treaty exists. *Id.* at 809 ¶ 15 (quoting 1955 Treaty, art. XXI(2)). He elaborated that "[t]he Court can only hold that the Applicant's construction is not 'arguable', or that it is not 'sufficiently plausible', or that the Treaty is not 'of relevance' to the claim, or that the claim lacks some 'serious judicial basis', or that the corresponding criterion set by other similar formulations is not met, if, from the point of view of an informed legal mind, it finds that the construction relied on is not based on rational and reasonably arguable grounds . . . ." *Id.* at 833.

C. The *Oil Platforms* Approach To Preliminary Objections, As Elaborated By Judge Higgins, Is Consistent With That Of The Parties

Although articulated in the context of a specific procedural regime, governed by its own special statute and rules, the I.C.J.'s methodology for resolving the preliminary objections in the *Oil Platforms* case, as elaborated by Judge Higgins, represents its current approach to the disposition of preliminary objections to the I.C.J.'s jurisdiction. And although *Oil Platforms* does not address all of the aspects of the standard of decision applicable in a NAFTA Chapter Eleven case under the UNCITRAL Arbitration Rules, that approach is entirely consistent with the standard propounded by both of the parties here.

As in Judge Higgins' analysis, the parties' methodology calls upon the Tribunal to "accept *pro tem* the facts as alleged by [the claimant] to be true and [in] that light to interpret [the Treaty] for jurisdictional purposes . . . that is to say, to see if on the basis of [the claimant's] claims of fact there could occur a violation of one or more of [the treaty's substantive obligations]." *Id.* at 856 ¶ 32. Indeed, the parties' approach here posits the same assumptions for purposes of admissibility. As in *Oil Platforms*, this may require a "very substantive and detailed analysis of the claims" at the preliminary stage, *id.* at 849 ¶ 11, and cannot be accomplished "on an impressionistic basis." *Id.* at 855 ¶ 29. Finally, here, as *in Oil Platforms*, there is no "jurisdictional presumption in favour of plaintiff." *Id.* at 857 ¶ 35.

In contrast, Judge Shahabuddeen's substantially more restrictive approach to jurisdictional objections in I.C.J. practice is not compelling, particularly in the context of a NAFTA Chapter Eleven proceeding under the UNCITRAL rules.

First, Judge Shahabuddeen's approach was not followed by the Court in *Oil Platforms*. A separate opinion the reasoning of which was rejected by the I.C.J. has little persuasive value here.

Second, Judge Shahabuddeen's approach was based in substantial part on a specific provision of the I.C.J. Rules not replicated in NAFTA Chapter Eleven or the UNCITRAL Arbitration Rules. The provision in question required, in Judge Shahabuddeen's view, the I.C.J. to refrain from *any* decision relating to the merits in addressing preliminary objections. *See* 1996 I.C.J. at 829-30 (citing I.C.J. Rules art. 79(5) ("proceedings on the merits shall be suspended" upon preliminary objection)). By contrast, the UNCITRAL Arbitration Rules' recognition of the authority to issue interim and partial awards makes clear that this Tribunal can, if it deems it appropriate, organize the proceedings into different phases and address the merits of the issues raised in each phase. *See* UNCITRAL Arbitration Rules art. 32(1).

Finally, Judge Shahabuddeen's approach would not be conducive to the efficient resolution of this dispute. It would serve no purpose to proceed to an evidentiary hearing where, as here, it is apparent that the claims fail as a matter of law.

CONCLUSION

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

Respectfully submitted,

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

June 20, 2001